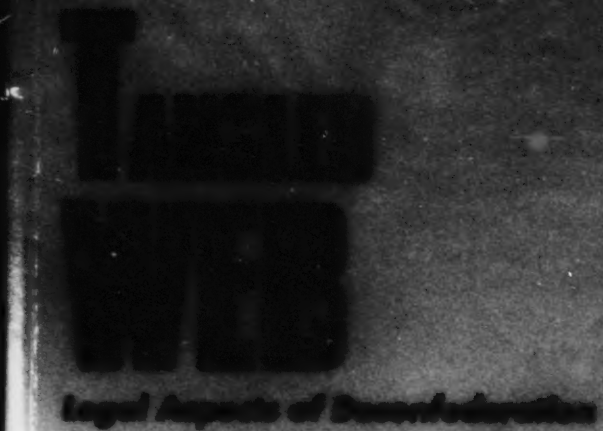
The CANADA ROUND

Stanley H. Hartt, Q.C.,
A.L.C. de Mestral,
John McCallum,
Vilaysoun Loungnarath,
Desmond Morton, and Daniel Turp



A Series on the Economics of the Breakup of Confederation

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C.D. Howe Institute
125 Adelaide Street East
Toronto, Ontario
M5C 1L7
(tel.: 416-865-1904; fax: 416-865-1866)

Tangled Web:

Legal Aspects of Deconfederation

Stanley H. Hartt, Q.C., A.L.C. de Mestral, John McCallum, Vilaysoun Loungnarath, Desmond Morton, and Daniel Turp

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A Series on the Economics of
the Breakup of Confederation — No. 15

John McCallum, Series Editor

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Foreword

Canada appears poised to embark on an historic political reconfiguration. It is essential that this process be undertaken with a clear and widely diffused understanding of the well-spring of Canadians' economic prosperity.

It is with that in mind that the C.D. Howe Institute presents this series of monographs entitled *The Canada Round*. The series assembles the work of many of Canada's leading economic and political analysts. The monographs are organized into two groups. The first group, called "The Economics of Constitutional Renewal," rests on the assumption of renewed federalism and is organized around economic themes. It examines the economic goals that Canadians have set for themselves, as well as the means of achieving them and the influence of alternative constitutional structures.

The second group of studies, called "The Economics of the Breakup of Confederation," examines the economic consequences of Quebec independence for both Quebec and the rest of Canada. A unique feature of the "Breakup" studies is that they are integrated with the research that has already been carried out by Quebec's Bélanger-Campeau Commission. Where appropriate, each of the studies in this group includes a summary of the relevant analysis by the Bélanger-Campeau Commission, contributions by experts from across Canada, as well as shorter critiques or replies. This format, we believe, will help to pierce Canada's "several solitudes" and create a pan-Canadian meeting of minds.

The Canada Round is not intended to alarm or frighten — the process of collective political definition in this country will turn on more than simply questions of dollars and cents. And, as these monographs will reveal, economics rarely produces an open-and-shut case as to the superiority of one possible set of rules over another. Even if it could do this, it would be unwise to assume that

economic analysis alone could change the minds of those who are already committed to a particular vision of the political future.

It is equally clear, however, that Canadians are now seeking a greater understanding of the links between the economy, the Constitution, and legal and political life. A significant reform of the Constitution will influence the economy, in some cases for the better; a rending of the Constitution under conditions of acrimony will almost certainly damage it. Thus, the purpose of the series is to help Canadians think constructively about the benefits and costs of alternative constitutional designs.

Underlying the series is a focus on the economic well-being of Canadians, now and in the future. To best insure this well-being over the short run, Canada needs calm, open negotiations in which efforts are made to understand and incorporate the aspirations of all the participants. This series of monographs is dedicated to that effort.

John McCallum, the series editor and Chairman of the Department of Economics at McGill University, organized the intellectual input. Within the C.D. Howe Institute, David Brown, Senior Policy Analyst, played a coordinating role. This fifteenth monograph in the series was copy edited by Lenore d'Anjou, Margaret Hoogeveen, and Barry A. Norris, and desktop published by Brenda Palmer. As with all C.D. Howe Institute publications, the analysis and views presented here are the responsibility of the authors and do not necessarily reflect the opinions of the Institute's members or Board of Directors.

Thomas E. Kierans
President and
Chief Executive Officer

The Study in Brief

This volume in "The Canada Round" is concerned with legal aspects of Quebec separation. Within that general rubric, there are two primary topics: first, legal aspects of alternative trade relations that might emerge in a post-breakup Canada and, second, the process of separation and the right to self-determination.

Part I: Legal Aspects of Trade Relations

Stanley Hartt brings the perspective of a practical lawyer familiar with the world of business. While he discusses various dimensions of Canada's economic union, his main focus is on the dozens of little-known provincial laws that grease the wheels of commerce. These laws are "founded on the principle of comity, or reciprocal courtesy extended by one jurisdiction to another in friendly recognition of each other's laws."

Hartt provides many examples of such laws, arguing that they would probably cease to exist if Quebec separated. His conclusion on the effects of terminating these laws can be summarized by quoting his long rhetorical question:

> What happens to commerce between a sovereign Quebec and Canada if the persons or entities of a sovereign Quebec are not certain if they:
>
> - can register security on 30-day goods in Ontario;
> - require an extraprovincial license to carry on business in Ontario;
> - do not automatically qualify to register as loan or trust companies in Ontario;
> - cannot sue an Ontarian (or Nova Scotian) party insured for the minimum prescribed limit in excess of the limits provided for under a Quebec automobile insurance policy;
> - cannot directly enforce a judgment against an out-of-Quebec insurer;

- lose the benefit of reciprocity and comity in the enforcement of interprovincial judgments;
- must get subpoenas issued in another province instead of having their own subpoenas enforced — or must seek letters rogatory to gather out-of-jurisdiction evidence; and
- must make proof of the statutes of Quebec or of notarial deeds in an Ontario court because Quebec has become a foreign jurisdiction?

Such detailed laws are certainly not very exciting or dramatic, but, Hartt argues, taken together they play a major role in fostering interprovincial trade. Or, as he puts it:

> massive uncertainty as to the regulatory and legal framework under which trade could be pursued would produce a reluctance to do business with Quebec. This disinclination would have its foundations not in mean-spiritedness but in an inability on the part of business people and their legal and accounting advisers to know the rules of trading and how to ensure the enforcement of claims.

Hartt provides several answers to the question of why provincial comity laws would cease to exist if Quebec became a sovereign country. Some of these laws are based on having a common appeal court of last resort — the Supreme Court of Canada — or on a common federal bankruptcy statute. Others would require redrafting at a time when legislators would have more pressing matters with which to contend. And, finally, in a post-breakup environment, other provinces may feel less inclined to extend the "courtesy" of provincial comity laws to Quebec.

Both the contribution of Armand de Mestral and my own short note can be seen as providing further support to Hartt's arguments. De Mestral describes the degree of economic integration under the General Agreement on Tariffs and Trade (GATT), the Canada-U.S. Free Trade Agreement (FTA), the Treaty of Rome, and the Canadian federal system. According to de Mestral, the notion that the GATT and the FTA would guarantee Quebec unimpeded access to North American economic space is "one of the most dangerous fallacies of the current debate." In fact, he claims, the Treaty of Rome is "light years ahead of the GATT, the GATT Uruguay Round, and the FTA."

Moreover, despite significant barriers to interprovincial trade within Canada, de Mestral argues that on the whole Canada enjoys a more integrated economic union than does Europe.

De Mestral emphasizes the crucial importance of supranational laws, rules, and institutions in Europe, as well as the impact of federal legislative powers, provincial comity, and the Charter of Rights and Freedoms in cementing the Canadian economic union. Because they lack these supranational elements, FTAs tend to be very much weaker, a point that is underscored by current Canada-U.S. disputes and by the historical tendency of FTAs in other parts of the world to fall apart under political pressure.

My own short note introduces a simple economic test of these propositions. If the arguments by Hartt and de Mestral were all wrong and a free trade agreement were just as good as a Canadian-style economic union, then the Canada-U.S. border should make no difference to the post-FTA pattern of trade. In fact, the trade statistics suggest that the border makes a huge difference. Even after allowing for a maximum effect from the FTA, export penetration of out-of-province Canadian markets by both Ontario and Quebec producers is massively greater than is penetration of U.S. markets at approximately the same distance. This suggests that the trade-fostering properties of the Canadian economic union are indeed far superior to those of a free trade agreement.

Vilaysoun Loungnarath responds to these arguments. He suggests, first, that Quebec would benefit from substantial economic integration due to the GATT, the FTA, and the continued use of the Canadian dollar. A further degree of integration could be achieved by the voluntary harmonization of legislative and regulatory frameworks. In part, such harmonization could be carried out unilaterally by Quebec — that is, Quebec could harmonize its laws with those of Canada. In other areas, harmonization could evolve naturally because it would be in the economic interests of both parties. In none of these cases would there be any need for political integration.

Citing the example of the Benelux countries, Loungnarath argues that a high degree of economic integration can be achieved

without political integration. The fact that the single example of the Treaty of Rome has involved considerable political integration does not in itself prove the general proposition that such integration is necessary to achieve an economic union. On the other hand, Loungnarath does acknowledge that Europe's supranational judicial processes "constitute major factors determining the qualitative superiority of the guarantees of access and of mobility inherent in the European common market, as opposed to those stemming from the GATT or the FTA." Accordingly, he recommends the establishment of a supranational Canada-Quebec judicial process that would underpin the economic union, while at the same time respecting the political sovereignty of both Canada and Quebec.

Part II: The Principle of Self-Determination

Part II of the volume opens with a summary of José Woehrling's contribution to the background papers published by the Bélanger-Campeau Commission. Woehrling analyzes the process of Quebec separation with or without Canada's agreement. In the first case, he argues, Quebec separation could proceed with the agreement of the federal government and seven provinces representing half of the population of Canada. He then goes on to discuss such issues as territorial integrity, legal continuity, the fate of federal civil servants, the rights of minorities and aboriginal peoples, international relations, and the division of federal assets and debt. In the case of a unilateral declaration of independence, Woehrling describes a possible process and discusses democratic legitimacy, legal continuity, and the consequences of a failed secession. A recurring theme is the primacy of legitimacy over legality and the desirability of a clear and resounding mandate from Quebecers.

Desmond Morton responds to Woehrling from the perspective of an historian. His basic points are that politics will prevail over law and that Canadians would be unique if we were to achieve a "friendly breakup." He contends that peaceful secessions have been extremely rare, arguing that Norway-Sweden in 1905 and Panama-

Colombia one year later are exceptions that tend to prove the rule. Neither does Morton exhibit much sympathy for the principle of self-determination, suggesting that "although there may be lawyers sufficiently ingenious to trace a consistency in United Nations doctrine on self-determination, the easiest explanation is political expediency flavored with opportune moral outrage."

Daniel Turp discusses Quebec's right to self-determination, as well as the implications for the aboriginal peoples of Quebec and the province's anglophone minority. As a result of Canadian precedents and actions bearing on Quebec's right to self-determination, a majority vote for sovereignty in a Quebec referendum could itself be an instrument of constitutional modification. Also, Turp argues, Quebec's self-affirmation as a people — which Canada has never challenged — confirms its right to self-determination according to international law. Moreover, the manner of the repatriation of the Canadian Constitution in 1982, together with the Meech Lake debacle, can be taken as evidence that Quebec has been denied the right to self-determination within Canada. This last condition is sufficient to justify secession under international law. In any event, recent experience in eastern Europe and the Soviet Union tends to confirm the view that politics and the desire of a people for liberty must take precedence over purely legal considerations.

On the other hand, Turp argues, aboriginals have equal claim to the status of "a people." In areas of Quebec where the majority of the population is aboriginal — for example, Northern Quebec — the aboriginal peoples probably would have the right under international law to dispose of their territory as they saw fit. Hence, they could elect to become a part of a sovereign Quebec, to form their own country, or to remain a part of Canada. While these arguments do not apply at all to Quebec's anglophone minority, a sovereign Quebec would be obliged by international law to respect the individual rights of minority groups.

Although the perspectives of Morton and Turp are poles apart, in one important sense the two authors do not contradict each other. Subject to the caveat regarding aboriginal rights, Turp argues that

Quebec has the legal right to become a sovereign country if the majority of Quebecers expresses that desire in a democratic fashion. Morton argues that if this should come to pass, history offers little hope that the breakup would be friendly.

John McCallum
Series Editor

PART I:

Legal Aspects of Trade Relations

Sovereignty and the Economic Union

Stanley H. Hartt, Q.C.

Economic Forecasts: The Problem of Assumptions

In the debate leading up to the 1980 Quebec referendum on sovereignty-association, both the "yes" and "no" sides fielded groups of economists to support their cases. Some argued that a sovereign Quebec in an economic association with Canada would be economically viable, while others argued that the uncertainty generated by so much change would result in a declining gross domestic product for Quebec and Canada and lower standards of living.

Since that time, the homegrown entrepreneurial class of Quebec has matured and come into its own, demonstrating impressive successes and experiencing real failures. It has become fashionable to assert that Quebec's new confidence in its business leaders and, particularly, the opportunities created by the Canada-U.S. Free Trade Agreement (FTA) would mean that the renewed debate on sovereignty — this time pointedly not sovereignty-association — could proceed without any threats of economic disaster or of dire consequences. Economists whose hypotheses still envisage a poorer Quebec and Canada after Quebec achieves sovereignty are threatened with the ultimate sanction of being haled before the National Assembly Committee mandated to evaluate the consequences of sovereignty.

The author acknowledges the help of Martin Jensen in the preparation of this essay.

The public debate on the federal government's proposals for a renewed Canadian Constitution contained in its discussion paper *Shaping Canada's Future Together* and the alternatives of the sovereignists have produced a whole new spate of analyses and predictions of the economic costs of the sovereignist model in terms of output, efficiency, and standard of living.

The problem for economists in joining this dialogue is that no economic study of the implications of a particular scenario can be defended unless its assumptions concerning a number of decidedly noneconomic parameters ring true. For example, an economist's estimation of per capita income on both sides of the frontier of an independent Quebec would be affected by an assumption that all movement of goods and services between the former province of Quebec and the other provinces would cease indefinitely or for a period of time, or, alternatively, by an assumption that such trade would continue uninterrupted. What is not in the purview of economists is forecasting the institutional structures that would likely result from an assertion of sovereignty by Quebec. Those are political, legal, and psychological questions about which economists have no special expertise.

The controversy over the Economic Council of Canada's twenty-eighth Annual Review turned on precisely this point.[1] The Council declared itself unable to study the impact of changes in political structure because of the unpredictable nature of such changes. It does not follow that questions about Canada's economic future are unworthy of examination. Indeed, it would be folly for Canadians to embark on an experiment of the magnitude of dividing their country without the helpful input of those who understand how to calculate the price of potential outcomes.

What is required is a multidisciplinary debate in which political scientists, lawyers, historians, demographers, sociologists, and psychologists add their voices to the process in order to develop likely scenarios as to the future relationship between Quebec and the other

1 Economic Council of Canada, *A Joint Venture: The Economics of Constitutional Options*, Twenty-Eighth Annual Review (Ottawa: Supply and Services Canada, 1991).

provinces of Canada in matters of trade, the monetary system, the central bank, and institutional structures that would survive a declaration of sovereignty. These forecasts would give economists something to measure without putting them in the invidious position of making predictions on matters beyond their realm of expertise. It would add credibility to their studies of the costs and consequences of sovereignty, thereby providing the most solid defense against the cries of indignation that invariably follow the publication of every new study.

This essay is an attempt to provide a starting point for the examination of likely structural outcomes from a legal point of view.

Canadians usually cite s. 121 of the *Constitution Act, 1867* — the so-called common market clause — as the basis of this union, but one should also point out that the constitutional allocation of legislative and regulatory jurisdiction plays a crucial role in determining the geographical extent of the Canadian market.

Nor should we ignore the rarely noted though numerous provincial laws that oil the wheels of commerce. These laws are adopted by the provinces with the notion of providing favored treatment to persons or entities of other provinces, as secured vendors, plaintiffs, or judgment creditors. This practice is founded on the principle of comity, or reciprocal courtesy extended by one jurisdiction to another in friendly recognition of each other's laws.

This essay also analyzes the means[2] available under international law for creating two independent political units from a single state. It outlines some of the difficulties of maintaining a common market after separation, as well as the practical obstacles to using legislative and regulatory jurisdiction for maintaining a single market when sovereignty, by definition, will remove from the central government the authority to ensure a single set of rules in many vital fields of activity. Finally, it points out that the rules of courtesy are

2 Advanced in José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec," in Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991).

just that, and they may well not be extended to a former political subdivision.

This essay is not an attempt to measure the actual effects of breakdown in the structures that nourish and maintain the Canadian economic union, but those whose expertise lies in measuring the national income costs of abruptly reducing the present complementarity of our provincial economies are invited to do so.

The Problem of Assumptions

Part III of the federal government's proposals for constitutional reform, entitled *Preparing for a more Prosperous Future*, and the Report of the Special Joint Committee on a Renewed Canada (the Beaudoin-Dobbie Committee) have both dealt with ways of strengthening the economic union resulting from the Canadian confederation, while suggesting significant shifts in legislative jurisdiction to the provinces. Economists could, and undoubtedly will, measure the output, income, and efficiency effects of such changes.

The federal government's economic proposals sparked the creativity of the mythmakers about their effect on cherished Quebec institutions such as the Caisse de dépôt et placement du Québec and the Mouvement Desjardins. This is all reminiscent of the Cassandras who predicted that the FTA would cost us our water, our culture, our medicare, our energy, and our regional development programs. Privately, even Parti Québecois (PQ) leader Jacques Parizeau says that the proposals to strengthen the economic union are what a "real" country would have done 50 years ago.

But Mr. Parizeau dreams that such arrangements will be entered into by a reinvigorated Canada and a newly independent Quebec; he does not believe they can be used to preserve and enhance the existing union. Mr. Parizeau contends that political and business leaders in Canada should commence an intelligent dialogue to decide which of the existing institutions ought to and can be preserved. A parallel dialogue would be engaged with equivalent interlocutors in the United States and Mexico with a view to preserv-

ing for Quebec the advantages it now enjoys — or will enjoy, in the case of Mexico — under liberalized trading arrangements.

There are a number of dimensions to Mr. Parizeau's quest. On the psychological level, it is not the PQ that is urging wrenching and dramatic changes. They want to leave almost everything the same. It would be the reaction to sovereignty, not sovereignty itself, that would bring about the dismantling of the familiar institutional framework. It might even be considered mean spirited for an opponent of sovereignty to suggest — or threaten — such a thing.

In its strategic dimension, this approach avoids the pitfall of the 1980 *étapiste* philosophy of René Lévesque and Claude Morin. Sovereignty was to be accompanied by a negotiated arrangement for economic association with Canada to ease Quebecers' fears of the unknown and make them more comfortable in voting to confer the desired mandate to negotiate. The trap was that if Canada had said "no" or had refused to negotiate, the sovereignists could not have proceeded even if they had won their referendum.

On the legal front, Mr. Parizeau's proposal is complicated. It means that arrangements that now have their sources in the Constitution, provincial statutes, or decisions of the courts would all have to be recast in treaties and protocols. Mr. Parizeau believes this stage should occur following the election of a PQ government in Quebec, and before a referendum to officially declare Quebec a sovereign state. Whether such a timing assumption is realistic is beyond the scope of this essay. If it is envisaged that Quebecers will not be asked to make the final choice on sovereignty until they know the outcome of these negotiations, then it is hard to argue that the mere election of a sovereignist government in Quebec would give authority to a federal government to negotiate the reconstruction of the economic union in the sovereignist model. In this sense, Mr. Parizeau's timetable partakes of the trap of sovereignty-association.

On the economic plane, the PQ road map presupposes the triumph of economic rationality over emotion, and assumes a sangfroid in the hearts of Canadians living outside Quebec, especially among the business community and its advisers, which may reveal

an incomplete understanding of what makes them tick. When the classical economists conceived of the notion of "economic man" — an idea so old it preceded the development of gender-neutral terminology — they based their discipline on the psychological premise that people would always act in their own best economic interests, maximizing profits and generating social benefits in the process. This premise may well not apply in the context of a country breaking apart.

And yet the axiom of economic man, though flawed in this particular context, is almost the entire basis for the presumption that business flows and special institutional arrangements, which now stimulate economic and trading relationships between Quebec and the other provinces, would be renewed or continue undisturbed. This outcome has been assumed, not analyzed, by the proponents of separation.

The Economic Union

Interprovincial Free Trade

The legal foundation of the economic union Canadians enjoy today derives from a variety of sources. Most familiar are the provisions of Sections 121 and 91(2) of the *Constitution Act, 1867*.

> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.
>
> 91. ...the exclusive Legislative Authority of the Parliament of Canada extends to....
>
> 2. The Regulation of Trade and Commerce.

The scope of the common market and customs union resulting from the foregoing sections has been examined in the courts a number of times since 1867.

It is not the purpose of this essay to attempt a comprehensive review of the jurisprudence on this subject, but it is useful to note the

language used by the courts in a few of these cases, to obtain a flavor of the intentions of the framers of the *British North America Act* as regards the economic union, as seen through judicial interpretation:

> A dominant intention of the drafters of the *British North America Act*...was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy....The attainment of economic integration occupied a place of central importance in the scheme. "It was an enterprise which was consciously adopted and deliberately put into execution." ....The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.
>
> Section 121 of the *Constitution Act, 1867*, was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation.[3]

> Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.[4]

> [T]o permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada.[5]

It is also clear, however, that s. 121 is only useful as a bar to customs duties between provinces, and ineffective against certain

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3 La Forest J. in *Black v. Law Society of Alberta*,[1989] 1 S.C.R. 591 at 608f.

4 Rand J. in *Murphy v. C.P.R.*, [1958] S.C.R. 626.

5 Laskin J. (as he then was) in *A.-G. Man. v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689 at 717.

other kinds of impediments to interprovincial mobility of goods. Moreover, it was not conceived of as a broader guarantee of mobility rights for persons, services, and capital.[6] It has already been supplemented by a guarantee of mobility rights in s. 6 of the Canadian Charter of Rights and Freedoms.

The Canadian common market remains in need of strengthening. In April 1991, the Canadian Manufacturers' Association published a study that found there were hundreds of interprovincial trade barriers, principally in the fields of public sector procurement, agricultural products, alcoholic beverages, and labor mobility.[7] Work had begun on mitigating or eliminating these barriers — and the cost they engender in terms of national income — even before the federal proposals on the economic union, which suggest a broadening of s. 121.

The federal proposals were criticized as being overly centralizing in character because of the machinery that it was proposed be established to manage the economic union and to ensure the harmonization of economic policies. There were, however, strong decentralizing tendencies to these proposals that have not received similar attention.

All in all, these proposed changes added up to a subtle, but substantial, response to the massive shifts in responsibility suggested by Quebec's Allaire Report.[8] Their potential for decentralization, of course, would have depended on what content emerged in the streamlining and delegation categories. If anything, the cumbersome machinery for the management of the economic union, for harmonization of economic policies, and for intergovernmental coordination, seemed designed to coexist with sharply *reduced* federal

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6 Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985), p. 736.

7 Canadian Manufacturers' Association, *Canada 1993: A Plan for the Creation of a Single Economic Market in Canada* (Toronto, 1991).

8 Quebec Liberal Party, Constitutional Committee, A *Quebec Free to Choose* (Quebec, January 28, 1991), usually referred to as the "Allaire Report" after the Committee's chairman, Jean Allaire.

jurisdiction by subject matter, as a way of retaining national standards and objectives and as a means of promoting equality in the services and regulations affecting Canadians and the country's international competitiveness.

The Beaudoin-Dobbie Committee report also recognizes that devolution of legislative jurisdiction to the provinces in important economic areas would create a significant possibility of divergent — even contradictory — policy. It suggests new machinery to resolve disputes concerning the free movement of goods, services, persons, and capital, agreements among governments on equivalent national standards to enhance mobility of persons, and an intergovernmental agency to review, assess, and report on the performance of governments in meeting the goals of the economic union in relation to the proposed "social covenant."

The point is that centralizing or decentralizing tendencies in the revamping of jurisdictional prerogatives are neither good nor bad in themselves. What matters is that the end result eases interprovincial commerce, ensures the mobility of resources, and optimizes their allocation and employment. However, decentralization requires a high degree of harmonization in order to produce economically advantageous results, and this is not always easy to achieve.

And yet, while all of this work goes on to improve the economic union, in the context of attempts to avoid the separation of Quebec, one must not lose sight of the sovereignists' goal of reconstituting the economic union between sovereign states. Can any contractual economic union ever provide for Quebec as advantageous a situation as existing institutions — not to mention the benefits of proposed improvements? Can the net effect of the existing constitutional provisions, the judicial interpretation of their impact, and the work on eliminating those barriers that remain be replicated in an agreement between Canada and a sovereign Quebec? Will Quebec be able to become a party to the Canada-U.S. FTA and to a future North American Free Trade Agreement that would include Mexico? Is such replication and participation an assumption on which economists should base their estimates of the costs of sovereignty?

National Regulation

Less often discussed as an aspect of Canada's current economic union is the very division of constitutional jurisdiction incorporated in the *Constitution Acts, 1867* to 1982.

In keeping with their view that all essential economic levers for the maintenance of a strong national economic policy should fall within the jurisdiction of the federal government, the Fathers of Confederation, in their wisdom, divided legislative competence in a way that produces a national — as opposed to a local — level of regulation in many of Canada's most vital and unifying industries.

For example, under subsection 15 of s. 91 of the *Constitution Act, 1867*, "Banking, Incorporation of Banks, and the Issue of Paper Money" is an exclusive federal matter. Section 18 of the *Bank Act*, R.S.C. 1985, c. B–1 gives banks incorporated under its authority the right to carry on business throughout Canada. The effects of laws such as this are both institutional and psychological. A bank with a charter under the above statute not only *has* all of Canada as its market, without needing further authorization from provincial officials, but it *thinks of* all of Canada as its market. In contrast, a firm licensed, say, by a provincial transportation authority to engage in the transport of goods as a common carrier within the boundaries of the province *has* and *thinks of* only that province as its market.

If one analyzes the list of businesses in which a federal, or pan-Canadian, structure and outlook flow from the level of government authorized to regulate commercial activities, it becomes evident that the division of legislative jurisdiction is a powerful tool in ensuring an economic union.

For instance, the *Canadian Radio-Television and Telecommunications Commission Act*, R.S.C. 1985, c. C–22 and the *Broadcasting Act*, R.S.C. 1985, c. B–9 give to the Canadian Radio-Television Telecommunications Commission (CRTC) the exclusive authority to license radio and television broadcasting undertakings. Once licensed, broadcasters think in terms of the limits of their signals, and not of provincial boundaries, when calculating their markets for advertising revenues or fulfilment of their mandates. Furthermore, the creation of networks

either by the national broadcasting service or by the private sector is facilitated by this licensing system, and institutional structures grow which are Canada-wide rather than local in their impact.

The regulation of the trade in grains under the *Canada Grain Act*, R.S.C. 1985, c. G–10 facilitates a national market for these products and an export commerce that is an essential part of the Canadian economic fabric, even though the grain-growing industry is physically centered in just a few provinces. This is accomplished by s. 55(1) of the act, which provides, by means of the declaratory power contained in s. 92 (10)(c) of the *Constitution Act, 1867*, that

> All elevators in Canada...are and each of them is hereby declared to be a work or works for the general advantage of Canada.

It is important to note that, in the case of the last two examples, the federal proposals contained in *Shaping Canada's Future Together* would have mitigated somewhat the federal responsibility to ensure an economic union. In the case of broadcast licenses, the proposals suggested that the federal government consult with the provinces on the issuance of new licenses, permit agencies of provincial governments to provide public broadcasting services (not limited to educational programming), and allow for provincial participation in the nomination of regional commissioners of the CRTC. In the case of declarations of works for the general advantage of Canada, it was proposed that the declaratory power set out in s. 92(10)(c) be removed. This abrogation of the 92(10)(c) declaratory power would be a significant decentralizing step that would leave the constitutionality of large parts of the *Canada Grain Act* in doubt. In both instances, the recommendations of the Beaudoin-Dobbie Committee suggest a softening of the federal proposals. Instead of consultation on the issuance of new broadcast licenses, there would be an agreement to identify the broad policy objectives of the Quebec government. Concerns about the effect of the abolition of the declaratory power should be met before it is abolished.

The *National Transportation Act*, S.C. 1987, c. 34 is the authority by which the federal government regulates railways, transport by

air, transport by water, transport by a commodity pipeline, extraprovincial bus or truck undertakings, and the nonbroadcasting aspects of telecommunications. These vital activities are given national scope by the mere fact that their businesses are regulated under an authority that the Constitution accords to the federal level. Their market frontiers are national, and their market goals, orientation, and the forms of their business organization are all established at the national level. These are powerful factors, all of which influence the institutional structure that supports the economic union.

Other examples of important jurisdiction conferred or held to have been conferred on the federal government by the Constitution are the *Atomic Energy Control Act*, R.S.C. 1985, c. A–16 and the *National Energy Board Act*, R.S.C. 1985, c. N–7. These acts have the effect of shaping the regulation of two key industries on a national rather than local basis.

How could a system of national regulation designed to ensure a single, homogeneous market in the northern half of the North American continent be replaced under a political structure of two sovereign states? By agreement, two states could harmonize regulatory regimes, but such harmonization would be difficult to achieve and is by no means a foregone conclusion. The output, income, and efficiency of the economies constituting the present Canadian economic space would not necessarily be maximized.

Institutional Comity

The least-noticed aspect of the economic union is not mandated by the Constitution at all, but results instead from a myriad of laws based on comity among provinces. These courtesy laws enable individuals and firms that conduct business in one province to enjoy a favored status in other provinces in relation to such matters as obtaining licenses to carry on business, having standing in the courts for legal actions, registering security interests against property, enforcing judgments, and like matters that function as the workaday tools of economic man. No one ships goods or sells services to a

country in a state of turmoil, or where the legal system, if one exists, is biased in favor of locals or is arbitrary in the manner in which it enforces contracts or ensures the satisfaction of debts. Canadians have advanced, established rules about such things, but, above all, they enjoy a system that affords advantages to all those partaking in the economic union called Canada. These benefits do not ensure uniformity in the daily grind of credit evaluation, but they do ensure predictability.

There are far too many examples of this sort of legislative comity to enumerate here. An examination of a few examples will illustrate the point. One instructive example can be found in the *Ontario Personal Property Security Act*, S.O. 1989, c. 16 (PPSA). In the revised Civil Code of Quebec, Article 1732 provides a right to recover, for nonpayment, moveable (personal) property that had been sold, within 30 days of delivery. The question arises about how, even if the contract of sale (or the invoice terms) provide that the transaction is governed by Quebec law, such a right can be perfected and enforced once the goods are brought into Ontario. As a classic example of interprovincial comity, s. 5(5) of the PPSA offers a solution.

> 5(5) Where goods brought into Ontario are subject to an unpaid seller's right to revendicate or to resume possession of the goods under the law of the Province of Quebec or any other jurisdiction, the right becomes unenforceable in Ontario twenty days after the goods are brought into Ontario unless the seller registers a financing statement or repossesses the goods within that twenty-day period.

This enactment was clearly a made-for-Quebec solution. Would it survive events whereby Quebec ceases to be "the Province of Quebec" and becomes "any other jurisdiction"? After separation, it would take a new enactment of the Ontario legislature to modify the subsection to establish an intent to continue the measure. (Quebec would no longer be a province, but it could not, by the very grammar of the drafting, be considered a jurisdiction other than Quebec.) Yet, one must ask if Ontario would bother to extend this important right or would abolish the provision entirely?

Comity works in both directions. In the case of *Banque de Nouvelle-Écosse c. Gilles Fournier et Ginsberg, Gingras et Associés Inc.*,[9] the Quebec Court of Appeal recognized the validity of an Ontario chattel mortgage on a car as against a Quebec-based trustee in bankruptcy. The court held that a security interest properly created under the law of Ontario was not invalidated by Article 2022 of the Civil Code, which provided that "moveables are not susceptible of hypothecation." The rationale had to do with the fact that the *Bankruptcy Act* applies throughout Canada. The act's definition of secured creditor, said the Quebec court, refers to all relevant provincial legislation and contracts agreed to by the bankrupt, provided such contracts are valid in the province in which they were concluded. Would the decision be the same if Canada and Quebec did not have a common bankruptcy statute?

Another example of interprovincial comity is the *Extra-Provincial Corporations Act*, S.O. 1984, c. 14. Under s. 2(1) and s. 4(1) of that act, corporations incorporated under the authority of an act of a legislature of a province of Canada or of an act of the Parliament of Canada may carry on business in Ontario without obtaining a license under the act. It is not an overwhelming obstacle to have to obtain such a license, but waiving the license is part of the reason so many federal companies and companies from other provinces find it so easy to do business in Ontario.

The provision is literally reciprocated in Quebec, where the *Extra-Provincial Companies Act*, R.S.Q. 1977, c. C–46 provides that companies incorporated under an act of the legislature of another province where Quebec companies are authorized to do business without being obliged to take out a license, are exempted from the requirement to have an extraprovincial license.

Corporations incorporated under the laws of Ontario, of Canada, or of another province or territory of Canada are treated equally for the purposes of applying for initial registration as a loan or trust

9 *Banque de Nouvelle-Écosse c. Gilles Fournier et Ginsberg, Gingras et Associés Inc.*, (1985) C.A. 301.

corporation under s. 31(1) of the *Loan and Trust Corporations Act*, S.O. 1987, c. 33.

The *Insurance Act*, R.S.O. 1980, c. 218 contains provisions that oblige insurers in Ontario to recognize higher minimum limits than those provided for in a policy when such higher limits are prescribed for another province or territory of Canada. The *Insurance Act* of Nova Scotia, R.S.N.S. 1989, c. 231 contains the same provision. The Ontario *Insurance Act* gives a direct right of action against an insurer to persons who have obtained a judgment in another Canadian jurisdiction against an insured person. So does the *Insurance Act*, R.S.B.C. 1979, c. 200, in s. 252.

Perhaps the most intriguing examples of interprovincial comity lie in the field of the reciprocal enforcement of judgments, or "exemplification" as it is called in Quebec. Under the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1980, c. 432, a judgment or an order of a court in any Canadian civil proceeding whereby a sum of money is payable, including an arbitration award enforceable under a law in force in the province or territory where it was made, can become enforceable in Ontario by the simple act of registration. Quebec also sets standards to ease the enforcement of judgments obtained from the courts of other provinces. In regard to any judgment rendered outside of Canada, Article 178 of the Code of Civil Procedure states that any defence that *was* or *might have been* pleaded in the original action may be pleaded to a new action for enforcement. In contrast, Article 179 provides that only those defenses that *might have been* pleaded may be pleaded to an action brought on a judgment rendered elsewhere in Canada, and then only if the defendant has not been personally served or has not appeared in the original action.

The judiciary has been even more vigorous in ensuring that the daily ebb and flow of commerce between provincial jurisdictions takes place in an environment that recognizes the principle of a Canada-wide union. Take for example *Aetna Financial Services Ltd. v. Feigelman*,[10] in which the Supreme Court of Canada set aside an order

10 *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161.

issued against a federally incorporated company with its head office in Montreal and offices in Toronto. This order had directed the company to stop transferring certain assets in Manitoba to one of its offices outside the province. Here is what Estey J. had to say at p. 184:

> [W]hat is meant by "jurisdiction" in a federal context?...The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the Provinces of Manitoba, Quebec and Ontario....It is simply a clash of...the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capacity, federally confirmed...to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province....In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word....It is subject to execution under any Manitoba judgment in every part of Canada.

One of the most recent, and important, decisions in this field is *Morguard Investments Ltd. v. De Savoye*,[11] in which the Supreme Court of Canada upheld an Alberta judgment against a defaulting mortgagor who had moved to British Columbia and failed to appear in the Alberta court despite having been properly served in British Columbia under the Alberta *ex juris* service rules. Writing for the court, La Forest J. makes a number of important statements. After referring to the *Aetna* case cited above, he affirms the reasoning of the B.C. Court of Appeal, which

> drew support from the fact that all superior court judges are appointed, paid and removed by the same government, and that

11 *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256.

> the *Canadian Charter of Rights and Freedoms* applies throughout Canada.[12]

A 1987 case, *Marcotte v. Megson*,[13] is cited with approval, in which the head note read:

> Reason would suggest that inside the Confederation of Canada the principle of reciprocity of jurisdiction should apply. The action was concerned...with a judgment of a next-door province, not a foreign state but a partner in Confederation.

La Forest J. concluded, at pp. 270–272, that earlier cases, in which Canadian courts treated in personam judgments of other provinces like those of foreign countries, based on a line of English cases, were faulty judgments, inappropriate to a federal state:

> [T]he courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces....[T]he English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country....A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms....One of the central features of the constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market....Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole....These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province....The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada....[A] regime of

12 Ibid., at 261.

13 *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300.

mutual recognition of judgments across the country is inherent in a federation.

Still further examples of special treatment for parties from sister provinces are found in arrangements for the reciprocal enforcement of subpoenas. With the exception of Quebec and New Brunswick, all the provinces and territories have enacted uniform statutes such as the *Interprovincial Subpoenas Act*, R.S.O. 1980, c. 220, using which a court can adopt as its own order a subpoena from another province or territory, provided certain immunities from the jurisdiction of the summoning province are recognized in favor of the witness. Quebec has provisions in Article 282 of the *Code of Civil Procedure* providing for a subpoena to be served on an Ontario resident in conformity with Ontario law, with punishment for defaulters deferred to the Ontario courts by Article 284.

The Evidence Acts, both federal and provincial, make special provision for the introduction in evidence of statutes and other official instruments that originate in Canadian jurisdictions. By contrast, foreign laws must be proved by expert testimony.[14]

Finally, the Securities Acts of Quebec and Ontario provide for recognition and enforcement of extraprovincial warrants and provide exemptions from prospectus filing and annual renewal requirements by the issuer where the purchaser is, *inter alia*, Her Majesty in right of Canada or any Canadian province or territory.[15]

What happens to commerce between a sovereign Quebec and Canada if the persons or entities of a sovereign Quebec:

- are not certain if they can register security on 30-day goods in Ontario;
- require an extraprovincial license to carry on business in Ontario;
- do not automatically qualify to register as loan or trust companies in Ontario;

14 See the *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss 17 and 31, and the Ontario *Evidence Act*, R.S.O. 1980, c. 145, ss 25(1), 28, 34, and 39.

15 See *Securities Act*, R.S.O. 1980, c. 466, ss. 121 and 71(1)(a)(i) and *Securities Act*, S.Q. 1982, c. 48, ss 213 and 41.

- cannot sue an Ontarian (or Nova Scotian) party insured for the minimum prescribed limit in excess of the limits provided for under a Quebec automobile insurance policy;
- cannot directly enforce a judgment against an out-of-Quebec insurer;
- lose the benefit of reciprocity and comity in the enforcement of interprovincial judgments;
- must get subpoenas issued in another province instead of having their own subpoenas enforced — or must seek letters rogatory to gather out-of-jurisdiction evidence; and
- must make proof of the statutes of Quebec or of notarial deeds in an Ontario court because Quebec has become a foreign jurisdiction?

Major procedural inconvenience would be the result. Most of the laws outlined above do not need to exist. Their abrogation would violate no constitutional requirement, even if Canada remained intact. In many cases, they are based on all parties having a common appeal court of last resort — the Supreme Court of Canada — or a common bankruptcy statute at the federal level. Of course, it is true that nationals of other countries still engage in commerce with Canadian entities despite not having the benefit of the significant level of comity available to parties from Canadian provinces, but they do not do so to the extent other Canadians do.

The high degree of complementarity of the economies of Canadian provinces is not solely a matter of geographical proximity. It also results from the availability of a variety of procedural accommodations that make life and commerce easier. This point can be easily overlooked when one considers the extent of the trading relationship that Canada maintains with foreign jurisdictions, most notably the United States. It would seem that, historically, Canadians have been able to overcome the barrier of foreign legal systems as an adjunct to their desire to expand their markets, and that foreigners have not proved reluctant to sell to Canada despite their not being entitled to the same degree of comity under our legal institutions as Canadians.

A more critical examination of existing trading relationships, however, would reveal how important the international border has been in affecting trade conduct. If the international border made no difference and the pattern of Quebec exports were based on economic considerations alone, one would expect to find that Quebec exports to the United States would be many times the value of Quebec exports to the other provinces, based on population. In fact, economists would find that Quebec exports to the other provinces are significantly greater than those to the United States. While some of this can undoubtedly be attributed to distance from market and the remaining tariff barriers in place in the years for which statistics are available, much of this effect is undoubtedly due to the availability of known and familiar institutions for financing and securing commercial debts and collecting accounts. This is an area economists could quantify, and corroborate or refute.

If proximity were the sole factor in determining Quebec's larger sales to the other provinces, we should expect to find — given the trade figures — that, within a radius of a day's truck drive or railroad delivery capacity from Montreal (say, 500 miles), the Canadian market is much larger than the U.S. In fact, the contrary is true. Thus, institutional familiarity is likely a greater factor than distance in determining trading relationships.

Empirical studies would be necessary to determine the extent of trading bias within Canada, and, of course, further work would be required to establish why the international boundary has made such a huge difference to the pattern of Quebec's exports. But one thing is certain: Quebec would be mistaken to think that its Canadian trade has nothing to do with current institutional structures. Foreign businesses regularly evaluate and decide not to bother with the procedural inconveniences of operating in Canada, which is at least part of the reason the provincial economies remain so highly interdependent.[16]

But many questions must be asked. How much would commerce between the present provinces decline if one of them were no

16 For a more detailed examination of this issue, the reader is referred to the comment by John McCallum in this volume.

longer a province and some or most of these institutional safeguards were up for discussion or in need of specific reenactment? What is the likelihood of these statutes being extended to a sovereign Quebec in cases where they are not available to foreign nationals? What changes in behavior would their nonavailability induce in terms of substitution of markets?

Likely Difficulties

Attempts to maintain the three aspects of the economic union examined above depend on more than just a will to do so. First, the principle that persons, goods, services, and capital may move freely without barriers or restrictions based on boundaries is not easy to ensure between sovereign states. Free trade agreements may guarantee free movement of goods only or goods and services originating in either of the contracting states, and may even extend to capital and labor, though such agreements do not go as far as making those guarantees absolute. Nonetheless, in the absence of a common external tariff, customs barriers are usually maintained to deal with rules of origin and imports from third countries. Immigration barriers are not all removed by free trade agreements.

Moreover, in a free trade agreement with Canada, Quebec could be asked to abandon its agricultural subsidies and quotas, the subsidy practices of Hydro-Quebec, and taxpayer support of industrial development through the Caisse de dépôt and other means. Canada would certainly not give a better deal to a sovereign Quebec under a free trade agreement than it would to a province that had chosen to remain within the Canadian federation. The subsidy policies of a separate Quebec could not be maintained under a free trade arrangement with Canada, unless those practices would be lawful in trade among the remaining provinces, under whatever improvement to s. 121 is ultimately agreed upon. Furthermore, these policies would simply be unacceptable under the present state of U.S. and Canadian trade law and under the Canada-U.S. FTA. In any event, the results available to Quebec under the FTA, assuming it could gain entry,

would fall far short of the benefits it now enjoys in the Canadian economic union.

A second major difficulty would be to determine how the common-market state of mind, induced by having a single regulator, could be preserved unless Quebec, after sovereignty, delegated back to Canada its powers over banks, broadcasting stations, grain elevators and terminals, telecommunications, railways, airlines, shipping companies, pipelines, bus and trucking companies, atomic energy, and oil and gas facilities — an extremely unlikely development. This is one area in which, even with the best of wills and the greatest rationality of economic man, some price would undoubtedly have to be paid in terms of output, income, and efficiency even if an attempt is made at harmonization of economic policies among governments.

The third and last category, institutional comity, would be well down the list of priorities of a dividing Canada. Conventional wisdom has it that the major stumbling blocks in the negotiations preceding sovereignty would be:

- the division of Crown assets and compensation for them;
- the proportion of the national debt to be assumed by Quebec;
- the creation of an economic union between Canada and Quebec;
- the inclusion of Quebec in the FTA and potentially in a North American FTA;
- the establishment of a monetary union or the use of the Canadian currency by Quebec as its own — in the fashion of Liberia and Panama, which use the U.S. dollar;
- the structure and role of the central bank, which would be responsible for maintaining the value of such currency; and
- the extent of the territory of the seceding province.

The conventional wisdom is probably right. But what happens to the dozens of structural items that constitute the institutional comity underpinning our economic union if the negotiations on the big-ticket items fall apart?

The Negotiation

In his study for the Bélanger-Campeau Commission,[17] Professor José Woehrling of the Faculté de droit, Université de Montréal posits two possibilities for the secession of Quebec: it will occur either with Canada's agreement or without it.

Much of Woehrling's study is devoted to the arcane complexities of international law in the matter of the respective rights and obligations of predecessor and successor states, but it is not surprising that, in his hypothesis of a *nonconsensual* separation, he predicts hostile feelings toward Quebec rather than a favorable disposition toward good faith negotiation. He also acknowledges that there would be a considerable degree of legal uncertainty.

Woehrling envisages an original scenario in which one form of Quebec's unilateral secession would be based on a law to be enacted by the Quebec National Assembly that would decree the primacy of Quebec laws over Canadian laws, including the Canadian Constitution. He hypothesizes that all existing federal laws would continue to apply in Quebec unless and until explicitly modified by, or found to be incompatible with, Quebec laws. Appeals to the Supreme Court of Canada would be ruled out, and all Quebec judges, including those federally appointed, would be required to respect the primacy of Quebec laws.[18] How this could be enforced is left up to the reader.

During this period, Woehrling contends that institutional links would remain in place, Quebecers would continue to elect Members of Parliament to the House of Commons, serve in the Canadian Armed Forces, possess Canadian citizenship, pay federal taxes, and receive federal benefits, including unemployment insurance. The legal uncertainty, he says, would only arise from doubt as to whether a particular federal law was or was not incompatible with Quebec laws.

The success of this venture would depend on massive support from Quebecers, on third-country recognition of Quebec's ability to enforce its laws within its territory, and on Canada's forsaking

17 Woehrling, "Les aspects juridiques."

18 Ibid., pp. 94ff.

military action to put down the secession. Other means of Canadian resistance could include a pan-Canadian referendum, legal challenges to the acts of the sovereign Quebec government, the use of existing emergency measures legislation, and criminal prosecution of members of the secessionist government.

It would hardly seem necessary to point out that, in such a scenario, the economic union would suffer dramatically in terms of the free movement of persons, goods, services, and capital, the harmonization of regulation, and the comity built into the laws of the respective provinces. Economists should base their calculations of the costs of sovereignty in terms of the legal uncertainty Woehrling admits, plus a good deal more arising from the breakdown of the institutional structure and the effect of such uncertainties on highly complementary economies.

Woehrling's second scenario presumes a Canadian willingness to negotiate. This is what Mr. Parizeau has long been arguing is the only sensible course of action.

According to Woehrling, one of the first issues of discussion would be the acquisition by Quebec of all federal assets on its territory. His list of such assets includes Crown lands, ports, airports, military installations, canals, railways, roads, bridges, parks, experimental farms, hydro installations, radio and television stations, public buildings and their furnishings, rolling stock, airplanes, boats and ships, financial investments, public funds, gold and currency reserves, monetary instruments, archives, libraries, museums, mining and forestry rights, shares of Crown corporations, and so on. Woehrling points out that international law states clearly that ownership of such assets located on Quebec's territory would pass to Quebec without compensation to Canada, without prejudice to Quebec's right to claim a share of other assets located elsewhere to the extent that such assets were acquired with funds originating in Quebec.[19]

In the matter of Quebec's share of the national debt, Woehrling says that Quebec would remain fully responsible for past debts

19 Ibid., p. 74.

contracted by the government of Quebec and by municipalities and school boards. As to the federal debt, traditional international law provides that the successor state has no obligation whatsoever in that regard. However, under the Vienna Convention of 1983 — which is not yet in effect — Quebec would be obliged to assume an equitable share of the federal debt. The appropriate share of the debt would likely be determined by weighing such factors as the relative population, size of territory, contribution to government revenues, national income, national product, and the capacity to pay.[20]

While Woehrling makes no calculation of the proportion of the federal debt that Quebec would be obliged to assume, based on the foregoing criteria. the Secretariat of the Bélanger-Campeau Commission does so in a separate background paper.[21] In it, a figure of 18.5 percent of federal liabilities is proposed as equitable, accompanied by a strategic approach designed to value and distribute assets to Quebec's advantage while reducing its debt burden to compensate for an alleged asset "shortfall."

If Quebec's proposal on asset valuation and distribution and debt reduction were to be presented as blatantly biased in favor of Quebec, it is hardly evident how this would stimulate phlegmatic rationality. Discussions of economic and monetary union would not, in such circumstances, be likely to proceed smoothly. The sovereignists seem to be dealing with a mythological Canadian who exists only in their imaginations. The above positions would appear to most level-headed, profit-oriented non-Quebecers as confiscation, and would far more likely lead to a rapid escalation of retaliatory measures than to cool, calm negotiations bent on preserving comity and common institutions. These days, it is fashionable in Quebec to measure the fairness of constitutional proposals in the light of how they would affect the Caisse de dépôt et placement du Québec, the

20 Ibid., p. 75.

21 Bélanger-Campeau Commission Secretariat, "Analyse pro forma des finances publiques dans l'hypothèse de la souveraineté du Québec," in Bélanger-Campeau Commission, *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 1 (Quebec, 1991), pp. 393–566.

symbol of the success of Quebec in the use of state/private sector cooperation for development with locally generated capital. For example, soon after the federal government floated its proposals for strengthening the economic union, attempts were made to convince conventional wisdom that these were somehow aimed at hindering or controlling the future activities of the Caisse.

But if the Caisse's assets outside of Quebec, and privately owned assets of non-Quebecers in Quebec, were all caught up in the retaliatory process, sovereignty would produce the worst outcome by far for Quebec's cherished institution. The scenario of a complete breakdown in negotiations to preserve the economic union — let alone to include Quebec in external free trade arrangements — is at least as plausible as the PQ's presumption that neither emotion nor a sense of outrage would arise in the breast of the business- oriented nonfrancophone community and that Quebec's departure need cause minimal disruption in the normal flow of business.

The alternatives discussed thus far have been between two extremes: an amicable parting and a hostile one. Even if the federal government and the other provinces accepted Quebec's right to self-determination and agreed with the view that a vote for sovereignty would be a democratic expression of a desire to be governed under new constitutional forms instead of an illegal secession, the parting could be a hostile one. What might begin as an amicable parting could easily break down in anger and aggression if negotiations on terms and means failed. This could produce exactly the same result on surviving institutions as a parting in which the entire panoply of hostile recourses against unilateral separation were to be employed.

If the sovereignists cannot achieve the outcome they hope for, massive uncertainty as to the regulatory and legal framework under which trade could be pursued would produce a reluctance to do business with Quebec. This disinclination would have its foundations not in mean-spiritedness but in an inability on the part of business people and their legal and accounting advisers to know the rules of trading and how to ensure the enforcement of claims.

The scenario of an amicable parting would, in such circumstances, have to be re-evaluated, and assumptions that there would be no shock or acrimony in relation to such matters as the extension of credit, foreign exchange rates, or the erection of barriers to trade would have to be reexamined. The duration of this uncertainty would determine the amount of damage done. Indeed, as John McCallum and Chris Green have recently pointed out,[22] account must be taken of both short-run, or first-round, effects, and long-run, or second-round, effects, which would likely involve disinvestment and outmigration.

In this essay, I have not attempted to predict the future. Rather, my purpose was to inject a note of reality concerning the nature of the Canadian economic union and the complexities of and obstacles to preserving it successfully. Nor have I tried to examine the structural consequences of a breakdown in institutional risk-sharing, through the cessation of federal transfers, or the abandonment of social policies and common taxation policies that at present apply to the entire Canadian economic space.

The potential breakup of the institutional and other national frameworks can only be incorporated into an analytical model to calculate the costs of separation with some difficulty. As the Economic Council of Canada has noted, additional debt-service costs and budgetary impacts are easier to calculate than the costs of lost output arising from structural changes that would require the development of a whole new model of the economy in order to make precise measurements. The stakes are great enough to warrant such a project, although the time limits imposed by current referendum plans is likely too short to permit a full and accurate calculation of costs.

Every study that has looked beyond the immediately knowable and foreseeable has concluded that a dissolution of the Canadian economic union, and the elimination of the institutional underpinnings that smooth its functioning, would have profound negative economic effects on both Quebec and the other provinces — effects

22 See John McCallum and Chris Green, *Parting as Friends: The Economic Consequences for Quebec*, The Canada Round 5 (Toronto: C.D. Howe Institute, 1991).

that would be more damaging than the costs of a friendly parting of ways. Considering this, the truly rational thing to do would be to cool the passions long enough to thoroughly examine the consequences of such a momentous decision. The way to do this would be to develop a sense of what the surviving constitutional, regulatory, and legal environments might look like and then, based on these conclusions, to make more precise economic forecasts free of the rhetoric of threat and intimidation.

Economic Integration under the GATT, the FTA, the Treaty of Rome, and the Canadian Constitution

A.L.C. de Mestral

Maintaining the existing economic union if Quebec and Canada separate is seen as both desirable and possible by most *souverainistes* and even more so by discouraged federalists. The leaders of the Parti Québécois have defended this thesis. The report of the Bélanger-Campeau Commission takes the same position, as does the Quebec Liberal Party's Allaire report. Maintenance of the existing economic union is thus a fundamental working hypothesis of those who favor complete political separation or a very extensive devolution of political and economic power from Ottawa to Quebec. How can this goal be achieved?

Souverainistes often assert that many of the potential economic difficulties attendant on separation would be avoided if Quebec sticks to the rules of the General Agreement on Tariffs and Trade (GATT) and the Canada-U.S. Free Trade Agreement (FTA). Even if Canada did not wish to conclude a special trading agreement designed to maintain and perhaps enhance economic links, they say, Quebec could continue to enjoy all the advantages of a common market and the existing economic union by adhering to the GATT and the FTA. According to this argument, these two agreements would require that Canada and the United States give free and unimpeded access to Quebec's goods, services, persons, and capital.

This assertion is one of the most dangerous fallacies of the current debate, and the purpose of this short paper is to refute it.

The rights of access that parties to the GATT and the FTA enjoy are considerable, and a sovereign Quebec would certainly be well advised to seek to claim them. (Indeed, it would have little choice with respect to the GATT, as its rules are the existing rules of international trade in goods, and small countries have no capacity to change them.) But to suggest that either the GATT or the FTA could provide the equivalent of the access to Canadian markets that Quebec enjoys under the Canadian Constitution is to seriously underestimate the limitations of both agreements. This issue is one that the *souverainistes* have not chosen to discuss publicly. It is also an issue that the media have largely ignored and that is not easily explained to the general public, because international rules seem abstract and remote from the average person. Yet the effects of the rules of international trade and the degree to which they would guarantee access to foreign markets for Quebec's goods, services, persons, and capital are absolutely vital to the current debate.

If Quebec separates, its accession to the GATT is a virtual certainty. But that accession would involve negotiating a complex set of tariff arrangements with 107 countries and making a host of other arrangements, some involving goods — such as textiles, aircraft, meat, and milk — and others involving rules of conduct.

Accession to the FTA is very likely but would pose even more difficult choices, including some major policy decisions. As has been pointed out elsewhere, the United States is unlikely to accept a sovereign Quebec as a partner to the FTA without exacting a price on such issues as exports of electricity, resources, agricultural products, and textiles.[1] One would also expect special consideration of the trade in automobiles and auto parts. Quebec's integration to the dispute settlement process would require changes to the agreement.

Most serious of all for Quebec would be the issue of the host of FTA rules that presently do not apply to it because of its provincial

1 See Gordon Ritchie, "Putting Humpty Dumpty Together Again: Free Trade, the Breakup Scenario," in Gordon Ritchie et al., *Broken Links: Trade Relations after a Quebec Secession*, The Canada Round 4 (Toronto: C.D. Howe Institute, 1991). The point was also made by Bill Merkin, deputy U.S. trade representative, when he was interviewed on CBC's *The Journal* in late February 1992.

status. It would presumably lose all these exemptions, with major consequences in a number of areas. For example, articles 1402.5 and 1607.1 of the agreement grandfather existing legislation covering services and investments, but any new legislation a sovereign Quebec might adopt on these matters would not be protected. Also, provincial regulation of the financial sector is generally grandfathered by the FTA, and its chapter 17 applies mainly to banks under federal jurisdiction. But any legislation of a sovereign Quebec on financial matters would be fully subject to the FTA, including, the United States would surely insist, any laws respecting banks — a field now covered only by federal law. The caisses populaires and even the Caisse de dépôt et placement du Québec might well be included. As yet this issue has not received serious consideration from *souverainistes*.

The purpose of this paper is not to deal with the issue of Quebec's joining the GATT or the FTA but rather to determine whether either would guarantee that its products, services, persons, and capital would continue to enjoy a degree of access equivalent to that of a genuine economic union, such as that now existing under the Canadian Constitution. To this end, the following pages summarize and compare the main areas covered, the rules, and the institutions of the GATT — both the existing agreement and the proposals of the current Uruguay Round — the FTA, and the Canadian Constitution. Similar information is presented on the Treaty of Rome, the base of the European Community (EC), which some observers propose as a model for Canada and Quebec if the latter separates. (An appendix tabulates the highlights of these contrasts.)

A concluding section emphasizes my belief that Quebec must look further than accession to the GATT and the FTA. This is not a question of details or legal plumbing but rather one affecting the lifeblood of Quebec's commerce. If it is true that Quebec needs continued access to the markets of the rest of Canada far more than it needs a wall of protection, then all those who wish to see its economy flourish in the future must consider the limitations of the GATT and the FTA before they take the leap of faith into the void of separation, for the GATT and the FTA will not save them.

For the record, it must also be understood that the creation of trade barriers between Quebec and the rest of Canada in the event of separation would do grave harm not only to the economy of Quebec but also to the economy of the rest of Canada.

Free Trade Agreements

The General Agreement on Tariffs and Trade

The GATT was adopted in 1947 as a temporary measure, in anticipation of the adoption of the much more ambitious constitution of the International Trade Organization. Then the U.S. Senate refused to ratify the latter agreement. Ever since, the GATT has stood as the basic set of rules and procedures for regulating international trade.

The GATT deals essentially with goods and the standard of treatment that states must accord them. It does not speak to the movement of persons or services, and only in recent years has it been shown to have some indirect relevance to investments — insofar as they relate to the purchase of goods.

The GATT's treatment of goods is based on a general duty to accord most-favored-nation treatment — that is, treatment equal to the most favorable status granted the goods of any other state — and in many cases national treatment — that is, treatment identical to that governing local goods. The agreement deals with tariffs very completely and has contributed to reducing them to an average rate of about 6 percent among developed countries — the level is considerably higher on some items. In principle, the GATT prohibits quotas, but in practice broad exceptions have been allowed in such areas as agricultural products and textiles. It permits devices designed to attract production from other countries, such as drawbacks and duty remission, and places scant control on the manipulation of rules of origin. And all the GATT rules are subject to the possibility of major exceptions and "waivers" of obligations.

The basic GATT text places few disciplines on nontariff barriers. In 1979, at the end of the last major round of multilateral trade talks, negotiators adopted a number of optional subsidiary agreements dealing with nontariff barriers such as antidumping and countervailing duties, customs valuation, import licensing, technical barriers, and government procurement. These agreements have expanded the scope of the GATT for the parties that have accepted them, but the discipline they are supposed to provide has often proven illusory — for example, in the case of countervailing duties against subsidies. Indeed, some people argue that the subsidiary agreements have become nontariff barriers in themselves. There is much room for improvement.

The GATT is not a formal organization, but it has provided a strong framework for trade negotiations and tariff reduction. The parties have increasingly attempted to provide a process of dispute resolution. After years of difficulty, use of this process is growing. It has many weaknesses, however, and although decisions are generally respected, those against major states are difficult to enforce.

As the only game in town the GATT has been of tremendous importance in trade matters, but its weaknesses and limitations are manifest. It is an international agreement, not a supranational one, its language is often vague, and the means of ensuring its enforcement are very limited.

The Uruguay Round Proposals

Since 1986, the parties to the GATT have been involved in an ambitious round of negotiations designed to continue the process of trade liberalization through the removal of tariffs and other barriers to international trade.

The Uruguay Round is attempting to improve the agreements on dumping and subsidies and the other texts concluded in 1979 as well as the language of the GATT dealing with safeguards — temporary restrictions on imports. It is proposed that textiles be brought

under the ordinary rules of the GATT for the first time and that agricultural subsidies and the quotas presently restricting the entry of agricultural commodities to Canada, the United States, the EC, and Japan be subject to much greater discipline. (In principle, agricultural quotas are to be replaced by tariffs, which can be more easily negotiated away in the future.)

In addition to improving the existing rights of access of imports, the Uruguay Round seeks to extend the scope of the GATT. It is proposed that there be an agreement on the trade-related aspects of intellectual property (TRIPs) and one on the trade-related aspects of investment measures (TRIMs). Another proposal is that the GATT be expanded to include certain aspects of trade in services, a move that would be of major significance as it would extend international discipline into a new and increasingly important area. The agreement on services would contain general rules as to the standard of treatment and would be completed by specific, but as yet unspecified, commitments on coverage. It would thus constitute a step on the long road toward the removal of barriers to services.

As well, the Uruguay Round seeks to improve the institutional structure and the rules on dispute settlement. It is proposed that there be a genuine institution (the Multilateral Trade Organization), that the disputesettlement process become much more effective and automatic in its functioning, and that it be made more difficult for states to refuse to implement panel decisions.

These proposals, if they are adopted in 1992, will constitute a major advance in the GATT's scope and effectiveness. Small states will be better assured that their GATT rights will be respected. The right of access of imported goods and, to a certain extent, of services will be better protected than before. But the GATT will continue to be an international agreement, not a supranational one. In principle, the parties will retain their freedom of maneuver — there will be no irrevocable commitment to permitting the entry of foreign goods and services. There remain a host of perfectly legal barriers that can be imposed upon foreign goods, so states will continue to seek reciprocal rather than global interests through the GATT.

The Canada-U.S. Free Trade Agreement

The FTA, like the GATT, is designed to promote the free flow of imports by removing barriers to their entry into the territory of each party. The FTA carries this process further than the GATT, essentially because the former was concluded between two states rather than 108; it was possible to remove more barriers in a bilateral context than in a large multinational one.

Like the GATT, the FTA is primarily devoted to goods, but it does deal with certain aspects of the standard of treatment of services and investments. It also contains a brief but useful chapter on the temporary access of persons engaged in providing services.

The FTA is based on the standard of national treatment, rather than most-favored-nation treatment, and, subject to broad grandfathering clauses, it applies to provincial laws and administrative practices. It goes beyond the GATT in both respects.

The FTA will have removed all customs duties on most categories of goods by January 1, 1998, affording much better market access than the GATT does. The FTA also provides for the phasing out of such trade-distorting measures as duty remissions, drawbacks, and export taxes, and it offers both parties improved protection against general and specific safeguard measures — those that temporarily restrict the importation of goods in certain crisis situations. The excuses for nonperformance and the exceptions to the FTA are also more limited than those allowed under the GATT.

The FTA contains specific provisions on access to energy goods, which one can argue the parties do not possess under the GATT. Agricultural products are covered to some measure. While the actual advantages of access are not great, the chapter on agriculture does limit certain Canadian subsidies and U.S. support programs. The chapter on government procurement contains little extension of GATT coverage, but it does provide a new enforcement mechanism. A special chapter was included in the FTA to remove several barriers to trade in wines and spirits (though not beer), particularly restrictions that have long been maintained by provincial monopolies.

The provisions on goods in general and agricultural goods in particular are reinforced by special provisions on the harmonization or mutual recognition of technical standards, as well as by commitments to simplify customs procedures and not to use such measures as indirect trade barriers.

The FTA attempts to restrict certain nontariff barriers. Yet it must be noted that the principal nontariff barriers from which Canadian negotiators sought relief — U.S. antidumping and antisubsidy countervailing duties — are not restricted. They are, however, covered by a special dispute settlement procedure.

The FTA is an improvement over the GATT in that it clearly extends to trade in services, a major advance given the ever-growing importance of the services sector for Canadian and U.S. trade. A long list of services covered in principle enjoy national treatment with respect to market access. Moreover, in order to encourage mutual recognition of licensing and certification procedures, it is proposed that sectoral annexes applicable to specific professions be negotiated in the future. The services sector is, however, far from completely opened by the FTA. Its provisions are hedged around by grandfather clauses protecting a host of existing measures, especially those under provincial jurisdiction. And a separate part on financial services grants fewer rights of access than the general services chapter and deals essentially with specific commitments made by both parties in anticipation of future legislative changes.

The FTA does not deal with the movement of capital as a general principle, but the chapter on investments does provide a right of national treatment to investments of the other party. The investment chapter is designed largely to ensure that some Canadian foreign investment regulations of the past are no longer imposed on U.S. investments. There are considerable grandfathering rights. The banking and investment chapters largely exclude the application of the dispute settlement procedures. The agreement provides no general right of free movement of persons, but it does contain a useful chapter designed to ensure specified business persons the right of temporary access. This right is only partially covered by the dispute

settlement procedures. The FTA also contains some very specific provisions requiring the parties to remove certain barriers to products, such as plywood, as well as restrictive copyright and patent protection — particularly that of Canadian drug patent legislation.

The administration of the FTA is ensured by a commission comprising a Canadian and a U.S. cabinet officer. Thus, the basic process mirrors the essentially political process of the GATT. An additional feature is the many joint committees provided for in various chapters of the FTA. Some of these committees, such as the ones established for the government procurement challenge procedure and the automotive industry study group, have been quite active since the agreement was signed; others have been much less in evidence.

Disputes under the FTA are subject to two procedures. The first, which involves a panel and mirrors the GATT processes, covers the application of most of the FTA. It is used for a complaint by one state against another; it is not open to private parties. Two disputes have been decided by this process since 1988, and a third case was begun in January 1992. The first case involved Canadian requirements that fish caught off the West Coast all be landed in Canada. Canada's rules were held to violate the FTA, and the matter was settled by its agreeing that a percentage of fish could be taken directly to U.S. ports. The second case involved U.S. minimum-size requirements for imported lobsters. This case was also decided in favor of the United States, but it has not been resolved to the satisfaction of Canada, which demanded a further panel in 1992. In summary, although the panel process provides relief and allows for authoritative interpretation of the FTA, Canada and the United States have experienced some difficulties in applying the decisions to the satisfaction of the other party.

The FTA's other dispute settlement process is directed only to antidumping and subsidy questions. Under this procedure, private parties to an antidumping or subsidy procedure may challenge the decision of the administrative tribunals in Canada or the United States, bypassing the normal appeals procedure in either country.

The only ground of appeal, however, is that the administrative tribunal has not been faithful to its own country's trade remedy legislation; there is no right to challenge the law itself. Some 15 complaints have been taken to this procedure, including one that went as far as the second-step "extraordinary complaint." The procedure is generally considered to have put some constraint on the administrative tribunals, although it has not limited the flood of private complaints taken to these tribunals in the United States. The most notable case involved U.S. restrictions on the import of pork. The U.S. administrative agencies were convinced of the justification of their restrictions; after losing before a binational panel, they were obliged to comply only when Canada won an extraordinary challenge. In early 1992, the United States threatened to reimpose countervailing duties against Canadian exports of softwood lumber; a Canadian challenge is likely.

The FTA is a clear advance over the GATT in its additional guarantees of market access. The extension to sectors other than goods is an obvious innovation — although some of these advantages may be overtaken by the Uruguay Round of the GATT. The FTA remains strictly a free trade agreement between two states, however. Both parties retain extensive freedom of maneuver and a right to withdraw. The United States has already shown a disposition to take steps that put the FTA in question, such as negotiating a similar agreement with Mexico — with or without Canada. The provisions of the FTA reflect the logic of agreements between states: except for disputes on antidumping and subsidies, private parties have no way to raise the agreement before the courts, and there is no provision for the development of a supranational body that has powers superior to those of the two governments. In other words, the FTA is a useful but limited way of ensuring greater market access for the goods of Canada and the United States. Its rules and dispute settlement procedures constitute an advance over those of the GATT, but its administration and future development are left entirely to the bilateral political process and are not sustained by any kind of supranational legislative or political body.

The fragility of the FTA was highlighted in early 1992 by complaints from Simon Reisman, former Canadian chief trade negotiator, and Gordon Ritchie, deputy chief negotiator, that the United States was not living up to its obligations under the agreement. Reisman was quoted as having said, "If the Americans say the hell with you and we'll do what we want, clearly then the free trade deal is over."[2]

Other Free Trade Agreements

Modern economic history is replete with failed free trade areas. Most of them were successful for a time and then failed either for political reasons or because they did not have the rules or the institutions necessary to sustain them when the going got rough. There have been free trade areas in East Africa, West Africa, the Caribbean, Central America, South America, and Southeast Asia. The Comecon was for a long time the Soviet caricature of the EC; it fell apart within weeks of the demise of the Warsaw Pact.

Nevertheless, states keep trying — and hoping for success. In 1990–91 two major new free trade areas were announced in Latin America. In January 1992, the most developed states of Southeast Asia announced their intention of forming a trading bloc.

One of the longest-standing free trade areas is the European Free Trade Association (EFTA). Formed as a rival to the EC by the outer, largely northern ring of European states, EFTA seeks to ensure mutual preferential access for the goods of its members.

EFTA was — and still is — a useful agreement promoting the free movement of goods and stating rules for their treatment. But it could never rival the EC, and when the United Kingdom and Denmark left to join the latter, there was little left to build on. In 1991, the six remaining EFTA members signed the Agreement on European Economic Space, a form of association agreement with the EC, which provides for the application of some 1,500 EC regulations and direc-

2 *International Trade Reporter* (Bureau of National Affairs, Washington, D.C.) 9, no. 6 (February 5, 1992): 255.

tives. The EFTA states are thus half in the EC already, and Austria and Sweden have made formal applications to join it. Finland, Switzerland, and Norway will be not far behind. These states have all made the decision that they can no longer remain out in the cold.

Economic Unions

The Treaty of Rome

The Treaty of Rome, establishing the European Economic Community, was first adopted in 1957 and has been amended several times since then. Major changes were approved in Maastricht, Holland, in December 1991; formal adoption is expected in 1992.

This treaty has been sustained and developed by a political process centered on political and administrative institutions in Brussels; its provisions have been implemented by countless regulations, directives, and decisions adopted there, as well as by a vast array of national laws and administrative measures taken in each member state. In terms of achieving and maintaining an economic union and market access for the four factors of production, the Treaty of Rome is light years ahead of the GATT, the GATT Uruguay Round, and the FTA.

The Treaty of Rome covers all the factors of production: goods, services, workers, and capital (including private payments). Each enjoys a right of access to the markets of each of the member states, and in principle, many barriers to free movement are absolutely illegal. The complete implementation of the principle of free movement is most absolutely stated with respect to goods. The rights of free movement of services and of the establishment of professional service providers are somewhat less absolute, as are the rights of workers to move from one country to another. The free movement of capital is the least protected by the mandatory provisions of the Treaty of Rome; it has been achieved only in recent years and will be genuinely guaranteed only by the formal adoption of the Maastricht amendments sometime in 1992.

The mandatory provisions of the Treaty of Rome are directly applicable and have direct effect in the member states. This means that they automatically form part of the corpus of the domestic law of those states. Furthermore, those provisions that have direct effect can be invoked by private persons and corporations against their governments, against the European Community's governing organs, and sometimes against each other. The same is true of the legislative instruments — regulations and directives — and decisions of the Community. EC law forms part of the law of each state, as if it had been adopted by the national parliament. The legislatures of member states have no need and no right to consider or reject this law; it is binding upon the parliaments, the governments, and the citizens of the EC. Most significant of all, EC law — the Treaty of Rome, regulations, directives, and decisions — enjoys supremacy over domestic law. This means that it replaces domestic law. In case of conflict with national law, EC law must prevail.

The EC's economic goal is described in the 1957 text as the creation of a common market and a community, to be achieved by the abolition of obstacles to the free movement of goods, services, persons, and capital, as well as by the creation of a common external tariff and the adoption of a common commercial policy toward third countries. The EC was also given authority over agriculture and transport. Most significant, the EC treaty contains important rules on competition policy (Articles 85 and 86), and the EC Commission is given power to enforce this policy directly. These provisions are tantamount to a constitutional imperative to maintain a free market economy in which competition and the values it promotes are to be protected. Subsequently, the EC was granted other areas of jurisdiction, either by decision of its legislative organs — in which the member states sit — or by amendment of the Treaty of Rome. As a result of the 1986 *Single European Act*, the economic goal of the EC is now defined as the achievement of a single market by January 1, 1993.

It is important to note that the Treaty of Rome prohibits both tariffs and nontariff and other indirect barriers to the free movement of the factors of production. Thus, no national antidumping or

antisubsidies measures allowed. (Dumping within the EC is dealt with by competition law, and subsidies of member states that distort intra-Community trade are prohibited and regulated by the Commission.) Measures equivalent to tariffs or quotas are strictly prohibited and may be challenged by private citizens. Taxes that have the same effect are also prohibited.

The net effect is that, in the sphere of economic regulation, roughly half of the new legislation in the member states comes directly in the form of EC regulations or is adopted by national parliaments pursuant to their obligation to meet the standards of Community directives.

At the present time, EC legislation, adopted to further the objectives of the Community, to ensure the creation of an economic union, and to guarantee the free movement of goods, services, workers, and capital, covers such diverse matters as community institutions; customs, tariffs, quotas, and international trade; the free movement of goods, agriculture, and fisheries; the free movement of workers; social policy, including the social welfare rights of workers; the right of establishment of service providers and the free movement of services; transport policy (road, water, and air); competition policy; taxation (including the Community value-added tax); economic and monetary policy and the free movement of capital; the external relations of the EC; energy; industrial policy and the development of the internal market; regional policy and the coordination of regional economic assistance; environmental, consumer, and health protection; research, information, education, and statistics; and companies. The 1990 *Directory of Community Legislation in Force* contains 727 pages simply listing the titles of Community legislation. The legislative mandate of EC organs will be further increased by the adoption of the Maastricht amendments.

The goals of the EC are implemented by both negative and positive means. States may not adopt various barriers to the free movement of the factors of production; these prohibitions form the bulk of the directly effective provisions that EC citizens may invoke directly. The goals of the EC are also achieved by positive grants of

legislative power to the EC organs — the Commission, the Council, and the Parliament — by virtue of which they are able to legislate.

One of the principal reasons for of the remarkable success of the Treaty of Rome in creating a true economic union is the existence of strong institutions. The Council, the principal policymaking organ, comprises representatives of member states and has both legislative and executive powers. The Commission, the executive and legislative organ, is composed of independent commissioners named by member states. The Parliament is the deliberative and legislative body. All three have grown in strength since 1957, and have legislated with great effect in order to implement and develop the principles of the Treaty of Rome. For a long time, the most important legislation could be passed only by unanimous vote. Today, however, most votes are passed by majority or qualified majority.

The European Court of Justice (ECJ) has general authority to interpret the Treaty of Rome. A variety of remedies exist whereby states, EC organs, and private parties can invoke the rules of the treaty against each other. The failure of a state to respect ECJ rulings is a violation of the treaty itself. Court decisions directed at EC organs or private citizens are directly binding and, in the case of individuals, can be enforced in domestic courts. The ECJ is perhaps the principal integrative force of the EC. It has made much law, and the doctrines of supremacy and direct effect that it has developed have had tremendous influence in defining the economic union and ensuring that EC organs possess the authority necessary to achieve the economic goals of the Treaty of Rome.

In brief, all the major EC institutions are genuine supranational institutions, having authority to bind the member states. In particular, the Commission but also often the Council or the European Council of Heads of State — the latter having emerged as a superior political body during the 1980s — have taken important decisions to advance the goals of the Treaty of Rome by taking new policy initiatives that have increased the scope of EC authority. Examples include the decisions in the 1980s to create the single market and common monetary and fiscal policies, and the 1991 Maastricht deci-

sion to achieve a common currency and closer political union. It is difficult to envisage the EC without the strong institutions that guide it in both domestic and international matters.

It is not the purpose of this paper to suggest that the EC constitutes the model that Canada and Quebec must replicate in the event of separation. What the EC model provides, however, is a vision of a genuine economic union of sovereign states that works — in comparison to, say, the rival EFTA, which is slowly wasting away. The EC model shows that a genuine economic union cannot be based on mere rules. Rules — serious, far-reaching rules dealing with goods, services, persons, and capital — are essential, but they are not enough to guarantee the success of an economic union and the access of the factors of production to the markets of member states. Such rules must be backed up, implemented, and expanded as necessary by powerful supranational institutions that have force at least equivalent to that of the pre-Maastricht EC. Just removing tariff barriers does not suffice. If nontariff barriers are not also prohibited, rules without institutions are scant guarantee of success. There must be genuine supranational judicial and legislative institutions to ensure the success of a true economic union among sovereign states.

In my view, saying that strong institutions are necessary to guarantee the existence of an economic union is tantamount to saying that economic institutions must be reinforced by political institutions. A legislative process such as that of the EC cannot exist without choice, and choice cannot exist without politics and community.

The Constitution of Canada

There is little need to review the elements of the economic union that exists in Canada. Suffice it to say that, by virtue of the existing Constitution, a genuine economic union does exist. Goods, services, capital, and persons (all persons lawfully in the country — not just workers) enjoy the fullest right of movement, and the constituent elements of the federation cannot deny them entry. We possess institutions designed to enforce our economic rights and liberties

against all persons and government institutions in the shape of the courts or federal institutions. Whether federal or provincial, barriers to the free movement of goods, services, persons, and capital that violate the Constitution can be challenged before the courts. Violations of section 121 by Parliament or the provincial legislatures, interference with the flow of international or interprovincial commerce by the provincial legislatures, and the imposition of discriminatory taxes generally can be challenged, as can the invasion of federal spheres of jurisdiction that promote the economic union, such as banking, federal corporations, and exclusively federal enterprises (such as those providing telecommunications services). Not all barriers to the free movement of goods, services, persons, and capital can be challenged. It has become obvious over the years that certain provincial barriers, such as those restricting access to certain professions, restrictive rules for public procurement, and the creation of commercial monopolies are constitutionally justified. Nevertheless, as Stanley Hartt argues elsewhere in this volume, the federal Parliament and the provincial legislatures are empowered to legislate with a view to enhancing the free movement of the factors of production and thus preserving the economic union.

It is true that the Constitution empowers Parliament and the provinces to create certain barriers to the free movement of the factors of production — barriers that have been described and criticized in recent years by governments, Royal Commissions, industry associations, and academic writers. The reason that these barriers pass the test of constitutionality is that the Constitution of Canada, adopted in 1867, was founded on principles of parliamentary supremacy, not on principles of liberal economic doctrine. Thus, the principle of the customs union of section 121 has been interpreted in the light of broad deference to provincial authority over contracts and local enterprises, as well as deference to the immunity of the Crown. This allows discriminatory purchasing practices by governments and such discriminatory practices as closing access to provincial service markets to extraprovincial corporations. Provinces can implement commercial and service monopolies. For the same rea-

sons, provinces have been able to experiment with a wide variety of social and economic policies, ranging from socialism to social credit. All these barriers appear to be constitutionally valid, although some judges appear to be becoming uncomfortable with the vision of Canadians' enjoying less protection against provincial barriers than Americans as a result of the FTA.

Although it is possible for Canadian jurisdictions to maintain some barriers to the factors of production that would not pass the test of the Treaty of Rome or even the Canada-U.S. FTA, the effects of these barriers are largely compensated for or nullified by other factors. First, as Hartt points out, federal legislative powers are a powerful means of maintaining and promoting interprovincial movement of the factors of production. The more extreme provincial economic experiments have generally run afoul of banking, interest, or criminal laws and even occasionally the federal trade and commerce powers. The existence of major health and welfare programs, as well as roughly equivalent educational and governmental services throughout the country as a result of federal equalization payments and joint cost-shared programs, has also helped to maintain the economic union, although they have put other strains on the political process.

Second, as Hartt also notes, provincial comity has helped to grease the wheels of commerce and thus to ensure that commercial rights created in one province will be respected in another. Third, the adoption of the Charter of Rights and Freedoms has reinforced certain mobility rights.

For these reasons, there is little serious threat to the economic union of Canada at this time. The system has considerable play, so that a province can protect certain institutions and yet simultaneously rely on the fact that its citizens and economic institutions will have largely unimpeded access to the markets of the other provinces.

From time to time a Parliament or a province goes too far in adopting protective measures. It is certainly possible to argue that the existing Constitution is not sufficiently committed to the values

of liberal economic rationality. Perhaps the text of the Constitution and the decisions of the courts do not sufficiently articulate prohibitions of certain types of barriers to the free flow of the factors of production. But we do have a strong economic union in Canada, and we have the judicial and legislative institutions to preserve and promote it.

Conclusion

The purpose of this paper is not to suggest that there is only one type of economic union for a federal state or for a union of sovereign states. Rather, the purpose is to demonstrate that if there is a real desire to maintain the economic union that presently exists between Quebec and the rest of Canada, the GATT (old or new) and/or the Canada-U.S. FTA are totally inadequate to perform that function. Maintaining a genuine economic union requires both far-reaching rules and institutions strong enough to implement and develop them. The GATT and the FTA fail utterly to meet these conditions. To maintain the contrary is nothing short of misleading.

Any solution short of an equivalent to the pre-Maastricht Treaty of Rome will not guarantee the freedom of access that Quebec must have to the markets of the rest of Canada in order to avoid profound disruption to its economy — and also to avoid disrupting the economy of the rest of Canada. A post-Maastricht type of union involving monetary union would be infinitely preferable.

This point being made, it seems clear to me that if the primary value to be defended in Quebec is economic union — access to markets — and not protection, political separation from the rest of Canada is a hollow option. If Switzerland, Austria, Sweden, Norway, Iceland, and Finland find life increasingly uncomfortable outside the EC despite centuries of separate national existence, it seems *a fortiori* that the same economic pressures would operate in Quebec. These pressures could not be relieved simply by adhering to the GATT or to the FTA.

Thus, separation guaranteed only by the GATT and the FTA is not a satisfactory solution. If Quebec were as powerful as the EC, Japan, or the United States, the weaknesses of those two agreements would not matter. Quebec could go it alone. But as a relatively minor player among the developed, market economy states, Quebec would not be strong enough to protect itself in economic negotiations and disputes with stronger partners. With a population of 7 million and an economy of $150 billion, it would not have the weight necessary in the GATT to defend its vital interests. States such as Holland and Belgium, not to mention France and Germany, with economies and populations much larger than Quebec's, made this calculation in 1957 and formed the EC. Certainly, neither the GATT, old or new, nor the FTA would guarantee a sovereign Quebec the rights of access to other markets that it needs. In particular, neither the GATT nor the FTA would guarantee it the rights of access to the Canadian market that it currently has.

Life in Canada for the francophone national minority, despite many advantages, has not always been easy. Sadly, many Canadians still do not understand that measures taken to protect and strengthen a minority are not privileges granted but rational steps taken to ensure that the minority does not feel oppressed by the majority. (Countries such as Switzerland learned this long ago.) However, I urge my *souverainiste* friends and colleagues with all due respect that life within the Canadian economic union is infinitely preferable to life outside. I strongly encourage them to consider that until they can guarantee their fellow citizens the equivalent or something better, Quebec has only one guaranteed market and only one genuine economic union — the economic union that presently exists under the Constitution of Canada.

An Economic Union or a Free Trade Agreement: What Difference Does It Make?

John McCallum

A critic of Stanley Hartt's paper could ask: If provincial comity rules are such an important lubricant of interprovincial trade, how is it that Canada manages to trade so much with the United States? Certainly, there are no comity provisions with respect to Canada-U.S. trade.

In thinking about this question, suppose for a moment that the Canada-U.S. border made no difference whatsoever to the pattern of Canada's trade. In that case, the regional distribution of exports from, say, Quebec should depend mainly on the size and proximity of the various markets. Since Ontario has a population of around 10 million, and since there are about 50 million people living in the nearby northeastern U.S. states — say, the six New England states, plus New York, New Jersey, and Pennsylvania — then Quebec should export roughly five times as much to the northeastern United States as it does to Ontario.

This would not be a fair comparison, however, since Canadian exports to the United States should increase as a result of the Free Trade Agreement (FTA) and the available data predate the FTA. Richard Harris, an economist at Simon Fraser University and an acknowledged expert in this area, informs me that estimates of the long-run effect of the FTA on Canadian exports to the United States range from zero to an increase of just under 25 percent.[1]

1 Actually, he said that, according to the maximum estimate, Canadian exports to the United States would increase by 5 percentage points of gross domestic product (GDP) relative to a 1984 base year. This means that these exports would...

Table 1 illustrates the results of this test. In 1984, the latest year for which figures are available, Ontario imported $17.9 billion worth of goods and services from Quebec; according to estimates derived from a recent study for the Bélanger-Campeau Commission, the northeastern United States imported $9.4 billion worth of goods and services from Quebec.[2]

Now, as already noted, if the border made no difference, Quebec's exports to Ontario should be about one-fifth of its exports to the northeastern United States. In fact, they were almost twice as great. In other words, in 1984 the average Ontarian spent $1,845 on goods and services from Quebec while the average American in the northeastern states spent just $185. Applying the estimate of a maximum increase of 25 percent thanks to free trade, the difference remains extremely large: $1,845 versus $231. The table also indicates that the average Atlantic Canadian spent a bit more ($2,215) on goods and services from Quebec than the average Ontarian ($1,845).

Table 2 suggests that the same general finding holds for exports from Ontario. Since automobiles and auto products are subject to the special arrangements of the Canada-U.S. auto pact, the table breaks down Ontario's exports by automotive and nonautomotive products. Excluding automobiles, in 1984 the average Quebecer spent $3,029 on goods and services from Ontario, while the average person living in the northern United States spent only about $183, or $229 including the adjustment for free trade. So the contrast is even stronger than in the case of Quebec: $3,029 versus $229. If automobiles — which amount to more than one-half of Ontario's exports to the northern United States — are included, these figures become

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Note 1 - cont'd.

...go from about 23 percent of GDP to 28 percent of GDP, implying a 22 percent increase (5 divided by 23) in exports, holding GDP constant.

2 Pierre-Paul Proulx and Guilain Cauchy, "Un examin des échanges commerciaux du Québec avec les autres provinces canadiennes, les États-Unis, et le reste du monde," in Quebec, Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991), pp. 55–166.

Table 1: *Quebec Exports to Three Regions, 1984*

	Exports to:		
	Ontario	Northeastern United States	Atlantic Canada
Quebec's exports to each region ($ billions)	$17.9	$9.4	$5.1
Population of importing region (millions)	9.7	50.8	2.3
Per capita purchases of goods and services from Quebec by each region ($)			
Actual	$1,845	$185	$2,215
Adjusted for free trade	1,845	231	2,215

Source: The figures for Quebec's exports to Ontario and Atlantic Canada are from Statistics Canada's Input-Output Division as reported by Pierre-Paul Proulx and Guilain Csuchy, "Un examin des échanges commerciaux du Québec avec les autres provinces canadiennes, les États-Unis, et le reste du monde," in Quebec, Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991), p. 128. On the same page, it is indicated that Quebec exports to foreign countries amounted to $20.4 billion. From p. 117 of the same source, I assume that 70 percent of this figure represents exports to the United States — although the year and data sets are not completely comparable. Then, from p. 145, I assume that 65.6 percent of Quebec's exports to the United States go to the northeastern United States, defined as New England, plus New Jersey, New York, and Pennsylvania. Putting these points together, I derive the figure of $9.4 billion (20.4 x 0.7 x 0.656). Population figures (for 1990) were derived from standard sources.

$3,117 and $470, respectively. The table also shows that total per capita purchases of goods and services from Ontario were of a similar order of magnitude ($3,556 versus $3,117) in the two Canadian regions —the Prairies provinces and Quebec — that are contiguous with Ontario.

Implications

These results seem to imply that, as far as trade is concerned, the international border not only makes a difference, it makes a *huge*

Table 2: *Ontario's Exports to Three Regions, 1984*

	Exports to:		
	Quebec	**Northern United States**	**Prairie Provinces**
Automobiles ($ billions)	$0.6	$20.5	$0.7
Other exports	20.6	15.6	15.3
Total	*21.2*	*36.1*	*16.0*
Population of importing region (millions)	6.8	85.2	4.5
Per capita purchases of goods and services from Ontario by each region			
Actual			
Automobiles	88	241	156
Other	3,029	183	3,400
Total	*3,117*	*424*	*3,556*
Adjusted for free trade	3,117	470	3,556

Sources: The figures for Ontario automotive and nonautomotive exports to Quebec and the Prairie provinces are from Pierre-Paul Proulx and Guilain Cauchy, "Un examin des échanges commerciaux du Québec avec les autres provinces canadiennes, les États-Unis, et le reste du monde," in Quebec, Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991), pp. 128, 137. From the same source, Ontario's total exports to foreign countries were $54.5 billion, including $26.5 billion for automobiles and $28.0 billion for all other exports. From Statistics Canada, *Exports, Merchandise Trade*, Cat. no. 65-202, Table 3, 66.3 percent of Ontario's merchandise exports in 1990 went to the northern United States — defined as Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Illinois, Indiana, Michigan, and Ohio — and 77.2 percent of exports destined to the United States went to those states. Consequently, the estimate of total Ontario exports to the northern United States in 1984 is $36.1 billion (0.663 x 54.5). Then, assuming that all automobile exports went to the United States, the estimate of automobiles exported to the northern United States is $20.5 billion (0.772 x 26.5).

difference. There is clearly a vital distinction to be made between an economic union as exists between Quebec and Ontario, and a free trade agreement as exists between Canada and the United States. Before discussing these differences, however, let me deal briefly with two other possible explanations of the findings presented above.

One possibility is that Harris' estimate of the maximum effect of the FTA is much too low, although in fairness it is about the best the economics profession has been able to produce. Moreover, the observed differences are so huge that even if Quebec and Ontario were to double or triple their exports to the United States as a result of the FTA, the qualitative conclusions would remain unchanged. For example, if Ontario were to triple its nonautomotive exports to the northern United States, the adjusted per capita figure (including automobiles) would be $790 for the northern United States, compared with $3,117 for Quebec.[3]

A second possible explanation is that much of the trade between Quebec and Ontario is the result of protectionism — in the dairy, clothing, and textiles industries, for example — that is now on the way out. While such considerations undoubtedly play a role, it is minor compared with the $17.9 billion of Ontario's imports from Quebec in 1984.[4]

How, then, can the large differences be explained? A free trade agreement, unlike an economic union, involves customs and immigration checkpoints, controls on the movement of people across borders, and litigation involving dumping, unfair trade practices, and the like. An FTA also involves uncertainty arising from the possibility that either side might one day choose to cancel the deal and impose tariffs. At least until recently, there has not been any such uncertainty in the context of the Quebec-Ontario economic union. Finally, it is possible that hitherto largely neglected features of the Canadian economic union — such as provincial comity rules — might indeed play very important roles in facilitating trade within the economic union.

While the evidence certainly suggests that the trade-fostering properties of an economic union are far superior to those of a free

3 Admittedly, under these circumstances, a part of the increased exports to the United States would come at the expense of exports to Quebec, with the result that the Quebec import figure of $3,117 would decline somewhat.

4 This point is confirmed by the commodity breakdown of Quebec-Ontario trade provided by Proulx and Cauchy, which indicates a relatively balanced structure of trade ("Un examin des échanges commerciaux du Québec," pp. 128–139).

trade agreement, it is not clear *why* these properties are superior. The evidence is consistent with a major role for provincial comity, but it does not prove that such a role exists. *Something* out there clearly makes an economic union very different from — and superior to — a free trade agreement. And in a sense that is all one really needs to know.

A Comment on Hartt and de Mestral

Vilaysoun Loungnarath

The arguments presented in the essays by Stanley Hartt and Armand de Mestral boil down to the thesis that Canadian federalism is the only arrangement that is likely to maintain a functional Quebec-Canada economic space. In this comment, I seek to show that such an assertion is highly debatable. I also want to refute pessimistic theories suggesting that Quebec sovereignty would mean the "Albanianization" of its economy and Quebec Inc.'s descent into hell.

Thus, I argue that, contrary to the claims of Hartt and de Mestral, Quebec's accession to sovereignty would not cut it off from the Canadian economic space nor would it prevent access to the Quebec market for Canadian goods and services. Quebec's achievement of sovereignty would be fully compatible with its participation in transnational or international economic spaces, regardless of the clauses that govern them.

Legal infrastructures are already in place to shape a residual or minimal economic space for a sovereign Quebec. This space could be extended if Canada and a sovereign Quebec were to conclude a treaty on an economic association. In this essay, I begin by describing the main parameters of a sovereign Quebec's residual economic space. I then argue that it would be to Quebec's and Canada's mutual advantage to seal an economic association, and that this association could be efficient and functional without being subjected to a political center.

The Residual Economic Space of a Sovereign Quebec: Significant Guarantees of Access to the Canadian Market

The technical studies annexed to the report of the Bélanger-Campeau Commission rigorously demonstrate that a sovereign Quebec would keep significant guarantees of access to the Canadian market, even in the absence of a formal legal arrangement with Canada. This residual or minimal economic space would be based on four pillars:

- Quebec's entry into the General Agreement on Tariffs and Trade (GATT);
- the very high likelihood that Quebec would participate in a North American free trade area;
- the passing of a bill giving legal tender to the Canadian dollar on Quebec's territory — neither Hartt nor De Mestral addresses this issue, so I will not deal with it here;
- the voluntary implementation of a harmonization process for certain legislative and regulation frameworks, whether this harmonization is prescribed by trade requirements, prompted by a will to increase the flow of trade, or results from an entry into multilateral international agreements.

The GATT

From the start, de Mestral acknowledges that Quebec's entry into the GATT would not really be a problem. It is probable that Quebec would take advantage of Article XXVI, 5(c)[1] and accede to the GATT by right of succession. By choosing that route, Quebec would succeed to Canada's commitment to the GATT and thus avoid having to renegotiate what de Mestral calls "a complex set of tariff arrangements with 107 countries and a host of other arrangements."

1 General Agreement on Tariffs and Trade, (1950) 55 U.N.T.S. 188, [1947] T.S. Can. no. 27.

The GATT has contributed greatly to the expansion of postwar international trade. The Uruguay Round of multilateral trade negotiations, if it should have a happy outcome, would broaden the scope of the GATT, increase its efficiency, and strengthen its institutional structures and the mechanisms for resolving disputes. With respect to the extent of the structured economic space, the GATT certainly cannot be compared with a federal-style constitution or with a transnational instrument such as the *Single European Act*. But in the context of Quebec's accession to sovereignty, the "most-favored-nation" clause — the cornerstone of the GATT — would dissuade Canada from using punitive trade actions against Quebec, and prevent it from setting up a Berlin Wall around the new nation, as de Mestral suggests.

Moreover, in its current form the GATT would allow certain parameters of the current Canadian common market to be maintained. Thus, according to the closing section of Article XI, the established rights of Quebec's farmers to their share of Canadian markets would be preserved.[2]

The Canada-U.S. Free Trade Agreement

Quebecers generally have supported the Canada-U.S. Free Trade Agreement (FTA); indeed, without Quebec's support, the FTA in all likelihood would not have been negotiated. So a sovereign Quebec surely would not renounce the FTA; in fact, as de Mestral acknowledges, its entry into the agreement is very probable.

Some commentators have suggested that the FTA would have to be renegotiated if Quebec became a sovereign state, but the legal authorities they invoke are not very convincing and so far no legal

2 See Yvan Bernier, "Le maintien de l'accès aux marchés extérieurs: certaines questions juridiques soulevées dans l'hypothèse de la souveraineté du Québec," in Quebec, Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 1, Quebec, 1991), pp. 9–10.

study has given a satisfactory answer to this question. State practice in the area of treaty succession is evasive and disorganized, and there are few points of convergence in the doctrine. Furthermore, it is highly speculative to claim that the Americans would take advantage of the situation to strip a sovereign Quebec of its economic levers or to force on it a model of development. To do so is to attribute to them very Machiavellian intentions. In my opinion, the role of the state in the Quebec economy has also been vastly exaggerated in the political rhetoric. Very few precise examples have been given of Quebec state or para-state interventions generating significant distortions in trade flows oriented toward the United States. Of course, Quebec has set up original economic institutions, but the structure of its economy remains typically North American.

For all practical purposes, a sovereign Quebec's participation in the FTA would mean that Quebec and Canada should agree to apply the provisions of the agreement to their trade relations. Yvan Bernier considers the following scenario:

> What is more plausible...is that the agreement becomes applicable to Quebec by right of succession after Canada and the United States have agreed on the changes to be made to the agreement.[3]

Indeed, it is hard to imagine that free trade would be the rule in all of North America, while an impenetrable barrier would remain along the Ottawa River! Such an arrangement, on top of being completely ludicrous, would cause considerable distortions in trade flows. The economic agents in Quebec and Canada would certainly bear the brunt of this abnormal situation.

Quebec's participation in an expanded North American FTA thus would offer two kinds of guarantees. First, it would offer guarantees of access to the U.S. market, which, while not absolute are nonetheless significant. With the FTA, a sovereign Quebec could reasonably consider maintaining — indeed, increasing — the high

3 Ibid., p. 14.

growth rate of its exports bound for the United States.[4] Quebec thus would counterbalance its economic dependence on Canada. Second, the FTA would constitute an unavoidable reference — in fact, a minimum threshold — in defining and working out the clauses of the trade relations between a sovereign Quebec and Canada.

The Voluntary Harmonization of Legislative and Regulatory Frameworks

In exercising the prerogatives of a sovereign state, an independent Quebec could contribute unilaterally to strengthening its economic space by harmonizing its legislation with that of Canada. As the Bélanger-Campeau Commission Secretariat points out, in several areas, "sovereignty does not carry the obligation to be different."[5] A number of areas come to mind, such as the regulation of financial institutions, competition law, bankruptcy, or more technical matters such as intellectual property, or weights and measures. In several of these areas, international norms could be used as references, whether they are worked out within the context of multilateral treaties or proposed by international organizations.

The harmonization of legislation and regulations between two or several jurisdictions, therefore, can be accomplished without the political integration of these jurisdictions — that is to say, without the jurisdictions being subjected to a central authority having an autonomous democratic legitimacy. The harmonization process can result from the entry of sovereign states into a multilateral agreement, or they can quite simply be prescribed by trade requirements. In corporate and trade matters, economic forces often structure the

4 See Pierre-Paul Proulx and Guilain Cauchy, "Un examen des échanges commerciaux du Québec avec les autres provinces canadiennes, les États-Unis et le reste du Monde," in Bélanger-Campeau Commission, *Éléments d'analyse économique*, pp. 81–82.

5 Bélanger-Campeau Commission Secretariat, "L'accès du Québec aux marchés extérieurs et à l'espace économique canadien," in Bélanger-Campeau Commission, *Éléments d'analyse économique*, p. 48.

legal order and, therefore, bring the legal systems or the judicial organizations of sovereign states into alignment with some points of convergence.

Moreover, the section of Hartt's essay on "legislative comity" supports my assertion that autonomous jurisdictions can contribute to strengthening an economic space by exercising the powers inherent in their respective sovereignty, and without some impetus stemming from a central power. According to Hartt, an important aspect of the Canadian economic union is its

> myriad of laws based on comity among provinces. These courtesy laws enable individuals and firms that conduct business in one province to enjoy a favored status in other provinces in relation to such matters as obtaining licenses to carry on business, having standing in the courts for legal actions, registering security interests against property, enforcing judgments, and like matters that function as the workaday tools of economic man.

Other examples can be added to this list, such as the implementation of chattel mortgages in Quebec or the coordination of the activities of the Securities Commissions of Quebec and Ontario.

Note, however, that most of these examples concern matters of exclusive provincial jurisdiction, for which the federal government has no significant lever. Hartt thus implicitly acknowledges that, with respect to important sections of the economic space, the intervention of a central power or supranational legislative authority is not essential to create an environment favorable to trade flows or to the mobility of factors of production. His assertion that Quebec's accession to sovereignty would means the end of the "legislative comity" is therefore based on a dubious logic. This legislative comity is not, in fact, a feature of the federal structure, since it exerts its influence basically within the exclusive jurisdiction of the provinces. Rather, it is the reflection of a spontaneous order shaped by the requirements of trade and the needs of the economic agents, and this order exists whether or not Quebec remains part of the Canadian federation.

Can a Functional Quebec-Canada Economic Association Be Formed without Political Integration?

Quebec's accession to sovereignty would not entail the "Albanianization" of its economy. Quebec's entry into the GATT, its participation in the North American FTA, the use of the Canadian dollar on its territory, and the harmonization and legislative and regulatory coordination processes based on the interaction of economic forces or the entry into international multilateral structures, are all factors that would determine a residual economic space offering significant guarantees of access to the Canadian market to exporters in a sovereign Quebec. This residual economic space could be strengthened by a formal bilateral treaty that specifies the parameters and mechanisms of management. In my opinion, this scenario seems to be the most probable, since it would be in the mutual interest of both parties.

Most Quebecers no longer identify with the current federal system. Supporters of sovereignty and supporters of a decentralized federalism agree, however, that a Quebec-Canada economic space should be maintained — that is, they would keep the main part of the current guarantees relating to the free mobility of goods, services, people, and capital. Unlike de Mestral, I believe that Canada and a sovereign Quebec could, by means of a treaty, form an economic union recreating most of the current economic space without the union being dependent on political institutions with an autonomous democratic legitimacy for its management and structure. Political integration is not a prerequisite for economic integration.

Quebec, Canada, and the European Community

De Mestral claims that an economic space cannot be functional and offer genuine guarantees of access unless it is supervised by solid supranational institutions of a legislative nature. In support of this

assertion, he holds up the model of the European Community (EC) as an example, while acknowledging the dangers of a mechanical comparison between the EC and the Quebec-Canada case.

It is true that the EC has set up relatively solid legislative and judicial supranational institutions when compared with the institutional structures of the GATT or the Canada-U.S. FTA. It is risky, however, based only on the EC experience, to jump to a general law that establishes a relationship of exclusivity and direct proportionality between the degree of political integration and the degree of economic integration — a law that, moreover, would be imperatively applicable to the Quebec-Canada case. The description of EC institutions does not in itself constitute a logical chain establishing the existence of a fundamental economic law.

There is certainly no denying that the degree of economic integration sought is one factor that explains the current the importance of EC political and judicial institutions. But it is not the only one, and I suggest that the need to resort to solid supranational institutions to attain economic integration stems more from a series of "exogenous" factors that measure the distance to cover between the initial situation and the economic structure sought than from the degree of economic integration targeted. By exogenous factors, I mean the number of member states, their cultural and linguistic differences, the inequalities existing at the level of the political organization, the legal system, the economic regime or the stage of development, and the importance and complexity of the nontariff barriers involved.

The difficulty of the EC undertaking no doubt requires solid supranational institutions. On this side of the Atlantic, however, the exogenous factors pose a radically different problem: In the event of Quebec's accession to sovereignty, the project would be to maintain the essential features of the current Quebec-Canada economic space. As Hartt and de Mestral show, the economies of Quebec and Canada, and the legal structures within which they have evolved, are already firmly entwined. Provided that one accepts the strong influence of exogenous factors on the configuration of the management and

monitoring mechanisms of the economic space, a light structure could efficiently manage the economic space that Canada and a sovereign Quebec would share.

Quebec, Canada, and the Benelux Countries

The example of the Benelux countries — Belgium, the Netherlands, and Luxembourg — illustrates my assertion that a functional economic union can be formed without being subjected to a political center with an autonomous democratic legitimacy. Because of the number of states involved, their demographic structures, and the objectives they sought, the model of the Benelux countries is closer to the Quebec-Canada case than the EC model can be.

The treaty creating the Economic Union of the Benelux Countries came into effect in 1960, several years before the European undertaking reached its cruising speed.[6] Generally speaking, the economic integration of the Benelux countries is more advanced than that of the EC countries. The Benelux countries coordinate their economic, financial, and social policies; among them, the barriers to the free mobility of goods, services, people, and capital have, for all practical purposes, been removed. And yet, the economic union of the Benelux countries does not have a supranational structure that fits the description given by de Mestral; the Benelux treaty did not create institutions having an autonomous democratic legitimacy or the ability to adopt legislation that binds the member states. Instead, the management of the economic union is entrusted to trilateral political processes, implemented at the ministerial or administrative level. In that sense, the management mechanisms of the Benelux

6 Treaty Instituting the Economic Union of the Benelux Countries, (1960) 381 U.N.T.S. 166. On this subject, see the treaty project on the Canada-Quebec economic union by Daniel Turp, "Réponses aux questions posées par la Commission sur l'avenir politique et constitutionnelle du Québec," in Bélanger-Campeau Commission, *Les avis des spécialistes invités à répondre aux huit questions posées par la Commission* [Background papers], vol. 4 (Quebec, 1991).

countries are closer to the provisions of the Canada-U.S. FTA than to the institutions of the EC or the Canadian federation.

Judicial Integration

In order to be functional, an economic union does not have to rely on political integration. The management and monitoring of the economic union can be provided by consultation, coordination, and arbitrage mechanisms between the contracting parties. The setting up of a supranational judicial process is another form of management and monitoring of an economic union. While this avenue is veiled in de Mestral's paper, the idea is interesting and deserves further scrutiny.

Judicial power has been a driving force behind the EC's undertaking of economic integration. Because of its institutional importance and the impact of its jurisprudence, the European Court of Justice is a genuine supranational judicial authority. By contrast, the dispute-settlement mechanisms provided for by the GATT or the Canada-U.S. FTA are centered around interstate arbitrage procedures whose impact is limited. Such differences in the nature and scale of these judicial processes constitute major factors determining the qualitative superiority of the guarantees of access and of mobility inherent in the European common market, as opposed to those stemming from the GATT or the FTA.

An economic union created by a treaty binding Canada and a sovereign Quebec would certainly be structured by bilateral mechanisms of consultation and coordination of a political and administrative nature. I am in favor of adding a supranational judicial process to these mechanisms. The linking of an economic union with a form of judicial integration does not weaken in the least my proposition that political integration is not a prerequisite for a functional economic integration; in fact, it is a fundamental requirement of the judicial process that it be independent of the political powers.

By applying and interpreting the provisions of the union treaty, the supranational judicial authority would ensure the considerable

economic freedom and guarantees of access to markets provided for by the treaty. By its supranational nature, the authority would be much more than an arbitration court between states. Its decisions would impose legal obligations on their governments, while private interests — individuals or corporations — would have access to it or could appeal to its jurisprudence before the courts of common law. In short, not only would a supranational judicial process ensure the durability of the fundamental economic freedoms; it would also contribute substantially to the efficiency of the economic space shared by Canada and a sovereign Quebec.

Conclusion

As long as a sovereign Quebec and Canada were to acknowledge their respective interest in maintaining a common economic space and their readiness to take on the obligations and responsibilities this would entail, the two societies should be sufficiently creative and daring to devise a structure and institutions that would offer solid guarantees of access and of circulation to their economic agents. In the light of the EC and Benelux models or the experience of the Canada-U.S. FTA, is it so difficult to believe that, between Canadian federalism and the "Albanianization" of Quebec, there are many intermediate projects? Let us hope that Quebec and Canada are able to display the necessary wisdom and intelligence to explore them.

Part II

The Principle of Self-Determination

The View from Bélanger-Campeau: *Legal Aspects of Quebec Secession*

a summary by John McCallum

This is a summary of sections dealing with the secession of Quebec from Canada in José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec," in Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991).

In thinking about the possible secession of Quebec, it is important to consider not only the legality of alternative actions but also their legitimacy. The application of constitutional and international law is conditioned by political context. Since our institutions are founded on democratic principles, constitutional rules that are seen to be inconsistent with a strong and resolute public opinion will rapidly lose their legitimacy. The ultimate success of a unilateral secession by Quebec would depend largely on the number of countries that recognized Quebec as a sovereign state. In turn, such recognition would depend largely on the extent to which the people of Quebec expressed their support for independence in a clear and decisive manner.

The rest of this summary consists of two major sections: the first bears on the secession of Quebec with the agreement of "the Rest of Canada" (ROC), and the second on Quebec secession without such approval.

Secession with Canada's Agreement

It is evident that Quebec could secede legally if the act was agreed to by the federal government and the legislatures of the ten provinces. Indeed, it is likely that secession would also be legal if it had the approval of the federal government and seven provinces (including Quebec) that have in the aggregate at least one-half of the population of Canada.

Territorial Integrity

The Canadian Constitution states that the boundaries of a province cannot be changed without the consent of that province. This provision applies equally to Quebec and to Newfoundland and thus affects the Quebec-Labrador border.

On the other hand, in view of the fact that Quebec's secession would result in the geographical separation of Atlantic Canada from Ontario and points west, the government of Quebec would be well advised to grant the right of free passage, for both goods and persons, between Ontario and the Atlantic provinces. Such a right should be offered at the outset of negotiations, and it should not be contingent on the successful negotiation of a customs or economic union.

Actions Preceding Accession to Independence

Before any negotiations on secession, the government of Quebec should obtain a clear, strong mandate from the people of Quebec. Such a mandate could be provided through a referendum or through a general election fought on the issue of independence. The subsequent negotiations would probably involve both the federal government and the provincial governments, although in theory some or

all provinces of ROC could elect to delegate the negotiating function to the federal government.

The negotiations would necessarily involve the transfer of powers and sovereignty, succession to government debts and assets, succession to treaties, and future bilateral relations. If the parties so desired, the negotiations could also include the questions of a future economic union and common political institutions.

Before accession to independence, it would also be desirable to conclude agreements bearing on the rights of linguistic minorities. Reciprocal agreements could recognize the rights and privileges of anglophones in Quebec and of francophones in ROC.

The rights of the native peoples in Quebec would also have to be addressed at this stage. They are seeking the right of self-determination whatever Quebec's political status, and even if it achieves independence, they may wish the federal government to continue to play a role in their lives. One solution would be to create a joint Quebec-Canada body, preferably of a judicial nature, whose function would be to handle litigation in this area.

Concurrent with negotiations with ROC, Quebec should be preparing and adopting a new constitution, which would take effect at the moment of its accession to independence.

Enactment of Quebec Independence

The accession to Quebec sovereignty would coincide with Canadian legislation under which Quebec would cease to be a Canadian province. This legislation would take the form of resolutions by the Senate, the House of Commons, and the legislatures of at least two-thirds of the provinces (including Quebec) that have in the aggregate at least one-half of the population of Canada. The resolution would then be proclaimed by the governor general at the request of the federal cabinet.

Succession of States: Internal Affairs

The "succession of states" is the process whereby sovereignty over a given territory passes from a predecessor state to a successor state. Work by the United Nations Commission on International Law has helped to clarify the rules in this area, although much remains unresolved. What follows is a very general description of the principles of the succession of states as they might apply to the Quebec situation. This subsection deals with internal affairs and the next with international relations.

Continuity of Legal Order

A successor state must ensure legal continuity and the maintenance of public order. Thus, at the same time that Quebec becomes a sovereign state, the National Assembly should pass a law stating that all existing federal laws will continue to apply as if they had been passed by that legislature. These laws would remain in effect — assuming they were compatible with Quebec's constitution — until such time as the National Assembly saw fit to change them.

Federal Employees

From Quebec's point of view, its members of Parliament and senators would cease to represent its people at the moment of independence. Assuming that secession was negotiated within the framework of the Canadian Constitution, this view would also be that of the Canadian government.

In the absence of bilateral agreements to the contrary, all federal civil servants and members of the Canadian Armed Forces working in Quebec would lose their jobs on the day of accession to sovereignty. The government of Quebec would have no obligations whatsoever to them. According to the theory of succession of states,

Canada would, however, have to honor the pension rights of its former employees.

It is possible, of course, that alternative arrangements regarding the treatment of Quebec MPs would have been negotiated bilaterally in advance of Quebec's accession to sovereignty.

Quebec Citizenship and Rights of Minorities and Aboriginal Peoples

In the absence of agreements to the contrary, citizenship would be determined entirely by the place of residence at the time of secession. All Canadian citizens resident in Quebec at that time would become citizens of Quebec and would lose their Canadian citizenship. Similarly, Canadian citizens resident in ROC would remain Canadian citizens, and they would not acquire Quebec citizenship. Quebec citizens would have the same status in Canada as all other foreigners there; the same principle would apply to the status of Canadian citizens in Quebec.

In the absence of a reciprocal agreement to the contrary, Quebec would have no obligation to respect the rights of its anglophone minority (or other minorities) except through any international treaties to which it is or would become a party. The most important of these would be the United Nations International Agreement on Civil and Political Rights, which Quebec has already ratified in its capacity as a province. This agreement constrains governments from opposing minorities' efforts to preserve and promote their language and culture (using their own resources). In addition, the new Quebec constitution ought to contain explicit guarantees of the rights of minorities, perhaps along the lines of the guarantees that exist today in the Quebec Charter of Rights.

A trilateral relationship involving the native peoples was already suggested as something that might be worked out before Quebec independence. If Quebec acceded to independence without such an agreement, it would negotiate bilaterally with the native peoples, and there would be no role for the federal government.

Government Assets and Debt

The assignment of public assets and debt is always an important matter in the succession of states. The list of government assets is very long. It includes Crown lands; ports and airports; military installations and equipment; canals, railways, roads, and bridges; parks; hydro installations; radio and television stations; public buildings and their contents; rolling stock, airplanes, boats, and ships; financial investments and public funds; gold and foreign currency reserves; libraries and archives; mining and forestry rights; and shares in Crown corporations. International law states clearly that ownership of public assets located on Quebec territory would pass to the government of Quebec without compensation to Canada. Quebec could also attempt to claim a share of assets located in ROC (or in third countries) to the extent that they were acquired with funds originating in Quebec. Evidently, it would be preferable if these matters could be determined by bilateral agreement.

What would happen to public debt? Quebec would be fully responsible for debt contracted in the past by the government of Quebec and by municipalities and school boards within Quebec. With respect to federal debt, traditional international law states that a successor state has no obligation whatsoever to assume any part of it. According to the Vienna Convention of 1983 — which has not yet come into effect — Quebec would, however, be obliged to assume an equitable share of the federal debt.[1] In fact, the matter would probably be resolved by a bilateral negotiation that would also involve the matter of government assets. The appropriate share of the debt would probably be determined by considering a combination of relative populations, sizes of territory, contributions to government revenues, national incomes, national products, the capacity of the successor state to pay, and so on.

1 The question of the sharing of federal assets and debt is analyzed in depth in Paul Boothe et al., *Closing the Books: Dividing Federal Assets and Debt If Canada Breaks Up*, The Canada Round 8 (Toronto: C.D. Howe Institute, 1992). In that volume, lawyers Daniel Desjardins and Claude Gendron argue that the tendency of modern international law would probably oblige Quebec to assume an "equitable" share of the federal debt.

The Succession of States: International Relations

The international aspects of the succession of states concern succession to treaties and the rights of foreign persons and corporations in the successor state.

Treaties

The principles for the succession of states distinguish between "personal treaties" and "real treaties," which apply to a specific territory. Only the latter come with the territory and are binding on the successor state. The implication is, for example, that an independent Quebec would be bound by treaties relating to the St. Lawrence Seaway (a "real treaty") but that it would not automatically be a member of the North Atlantic Treaty Organization (a "personal treaty").

A second important distinction is between bilateral and multilateral treaties. In general, bilateral treaties remain in effect only if the successor state and the other party so agree. In principle and subject to certain exceptions, the successor state may accede to multilateral treaties through a notification of its succession. On the other hand, the Vienna Convention — which Canada has not yet signed — sets out the principle that the successor state is bound by all conventional obligations unless the interested parties decide otherwise. It would also be possible for Canada and Quebec to sign an agreement stating that Quebec would accede to all or some of the treaties to which Canada is now party; such an agreement would not, however, be binding on third countries.

The Rights of Foreign Persons and Corporations

Starting from the day of independence, foreigners in Quebec would be subject only to Quebec law. The most controversial issue here concerns the property rights acquired by foreigners through federal

legislation or contracts signed with the federal government. The traditional view is that these rights must be honored and that nationalizations must be compensated appropriately. Although this view has been challenged by a number of Third World countries, the debate is purely academic in the present context. Given the importance of relations with the United States, an independent Quebec would have little choice but to accept the principles of the market economy and to respect fully the property rights of foreign persons and corporations.

Actions following Accession to Independence

Numerous questions undoubtedly would remain unresolved in the immediate aftermath of independence. It would be desirable to create a Canada-Quebec tribunal that could help to find legal solutions to such questions and to provide rulings in cases of litigation.

Secession without Canada's Agreement

Suppose that Quebec decided to secede without obtaining the agreement of ROC. Two ultimate outcomes would be possible. The secession might eventually succeed: after a sufficient number of third countries had recognized Quebec's sovereignty, Canada would eventually be forced to grant its own recognition. At this point, the analysis of the previous section concerning Quebec-Canada negotiations would become relevant. Alternatively, the secession would fail and Quebec, by force or by its own choice, would be reintegrated into Canada.

In either scenario, the period following the initial declaration of independence would be crucial for several reasons. One of the most important is that there are numerous uncertainties regarding the application of international law to a unilateral secession. Partly for this reason,studies of the right to secession tend to focus as much on

political considerations as on legal rules. Moreover, there is little useful precedent since no secession involving a rich, industrialized country has occurred in modern times. Thus, political considerations and perceptions would become primary.

Rights to Self-Determination and Secession

Legal opinion is divided as to whether Quebec has the legal right to secede from Canada unilaterally. Rather than attempting a summary of complex legal arguments, it seems more illuminating to quote here at some length from Professor Woehrling's conclusion:

> The question [of secession] will not, however, be determined by a tribunal on the basis of legal considerations. The success or failure of Quebec's secession will depend on the capacity of the Quebec authorities to exercise their authority on the territory over which they claim sovereignty. As for international recognition of Quebec's independence, that will depend on the attitude of other states, which will evidently behave in accordance with a political analysis of the situation and in accordance with their own interests. Accordingly, legal arguments advanced by Quebec and Canada will be only a part of the overall situation, and certainly not the most important part. Two political forces will dominate all legal considerations: the *will of the people of Quebec*, which, if it is uncontestable and democratically expressed, will confer legitimacy on a unilateral Quebec secession in the eyes of international public opinion; and the *effectiveness of the secession* — that is to say, the ability of the Quebec authorities to exercise a monopoly of governmental authority over the territory of Quebec.[2]

The Process of Unilateral Secession

The first act of a unilateral declaration of independence (UDI) would be a law, adopted by the National Assembly and subsequently

2 Woehrling, "Les aspects juridiques," p. 92, my translation, emphasis in original.

confirmed by referendum, that decreed the primacy of Quebec laws over all other laws, including, of course, the Constitution of Canada. In addition, however, it would state that all existing and future federal laws would continue to apply in Quebec except to the extent that they were modified by Quebec laws or incompatible with them. (This legislation would have to be accompanied by other laws prohibiting the appeal of Quebec judicial decisions to the Supreme Court of Canada and requiring all Quebec judges — including federally appointed judges — to respect the primacy of Quebec laws.)

In view of the technical and somewhat obscure character of such a law, it would be difficult to interpret its approval by Quebecers as a clear expression of their desire to break all links with Canada and declare sovereignty. After all, most of the institutional ties between Canada and Quebec would remain in place: Quebecers would continue to elect MPs to the House of Commons, serve in the Canadian Armed Forces, possess Canadian citizenship, pay their federal taxes, receive unemployment insurance, and so on. Notice too that in approving such a law, the population would in effect be giving a blank cheque to the government of the day; that government would not have to specify which of the federal laws it would retain and which it would repatriate. In short, the federal government could denounce this procedure as a trick designed to obtain a disguised declaration of independence from the people of Quebec. The process, from the standpoint of opinion in both ROC and the international arena, would lack credibility and legitimacy.

There is also a risk that these procedures would result in a situation of legal insecurity. What is envisaged is the abrogation not only of federal laws that are changed explicitly by the National Assembly but also of those that are incompatible with Quebec law. Yet incompatibility between two sets of laws is rarely obvious or undebatable. The result would likely be very substantial uncertainty as to whether any given federal law should or should not continue to be obeyed.

Although a UDI might encourage the federal government to negotiate seriously with Quebec on a one-on-one basis, it is also

likely that ROC would insist that Quebec recognize Canadian constitutional law. It would thus be essential that Quebec's UDI be supported clearly and massively by the people of Quebec. Yet, as already noted, a law regarding the primacy of Quebec laws would suffer from ambiguity and lack of political clarity. Moreover, the process just described would be more likely to provoke hostile feelings toward Quebec in ROC than to create a favorable disposition to negotiate in good faith. In effect, Quebec would be simultaneously leaving Canada and remaining a part of it. Quebec MPs would continue to make up about a quarter of the House of Commons, and Quebecers would continue to travel on Canadian passports and to receive the same federal subsidies that they enjoy today. At the same time, the government of Quebec would be free to pick and choose between the federal laws that would or would not apply to Quebec.

These observations suggest that any UDI should be approved by the people of Quebec in terms that are crystal clear and devoid of any possible ambiguity. To avoid legal uncertainties, all current federal laws — but not future ones — would have to remain in force unless they were *explicitly* abrogated or modified by the Quebec parliament. Quebec could not undertake a UDI while simultaneously continuing to influence and benefit from Canadian institutions and programs. Such an attempt to have one's cake and eat it too would only serve to increase the amount of anti-Quebec feeling in ROC — feeling that would in any case be substantial.

Intentions of the Successor State

Although international law offers no guidance as to the appropriate form of a UDI, it would be advisable for the secessionist authorities to indicate their intentions in a number of areas, including the treatment of contractual obligations entered into by the federal government, the succession to treaties and to debt, and the rights of foreign persons and corporations. (Notice that these areas correspond to issues associated with the succession of states already discussed.)

The Consequences of a Unilateral Secession

A UDI is almost always resisted by the original state. Military action is not prohibited by international law, and the secessionist government is subject to all the penalties proscribed by the domestic legal system. This line of reasoning is not pursued further here, partly because it is hoped that the federal government would not use force to oppose a democratic UDI by Quebec and partly because Quebec does not have the means to resist any action by the Canadian Armed Forces.

A UDI could, however, be resisted by the Canadian government through many actions short of direct military intervention. They include a pan-Canadian referendum, the legal contestation of all acts by the secessionist government, the use of the *Emergencies Act* and the suspension of civil liberties in Quebec, and the criminal prosecution of members of the secessionist government and all those who refused to obey Canadian law. The territory of Quebec would have rival legal systems confronting each other: the federal order and the Canadian Constitution versus that of Quebec. Each citizen would have to decide the "legality" to which he or she would subscribe.

A unilateral secession would be judged a success if, over a long enough period of time, the Quebec authorities succeeded in excluding the application of Canadian law on the territory of Quebec. Such a secession would fail if the federal authorities succeeded in enforcing Canadian law on Quebec territory by force or by peaceful means. In the case of failure, the political leaders and upper-level civil servants of the secessionist regime could be charged with sedition and treason. On the other hand, the territorial integrity of Quebec would remain intact, since the provisions of the Canadian Constitution would remain in effect.[3]

In concluding his study, Woehrling emphasizes the point that international law provides little guidance on whether other countries would recognize a newly sovereign Quebec. The outcome

3 As already stated, the Constitution does not permit a change in provincial boundaries without the consent of the province in question.

would depend on the actions and attitudes of the Canadian and Quebec authorities, and on the economic, political, and military interest of third countries — most notably the United States.

Reflections on the Breakup of Canada, Conflict, and Self-Determination

Desmond Morton

Reflecting on the breakup of Canada has been a painful, awkward chore and, in consequence, one much postponed. More than most such chores, it is a very personal ordeal. The vision of Confederation, with all its complexities, frustrations, and possibilities, has given purpose to my life and a focus for whatever scholarship I have attempted. To learn, in the middle of my middle age, that my fellow citizens prefer a narrower, meaner vision of their country and that they are profoundly ignorant of the possibilities held out to Canadians by John A. Macdonald, George-Étienne Cartier, Wilfrid Laurier, or the young Henri Bourassa is to experience both despair and a profound sense of failure. Still, unpleasant prospects seldom yield to passive wishing. Ignorance about the possible consequences of a Canadian breakup may indeed be invincible, but it has yet to be assaulted.[1]

Professional caution reinforces emotional reluctance. Although historians are seldom invited to debate public policy except as part-time prophets, their professional expertise is in the past, not the future. Minerva's owl flies at night. Futures grow out of the past, but they do so in unpredictable ways. History is more imaginative than

1 Media coverage of the proceedings of a conference by the Canadian Institute of Strategic Studies on National Unity and National Security at Toronto, November 6 and 7, 1991, showed the hysteria caused by the unfamiliar or the unexpected. See *The Globe & Mail* (Toronto), November 6 and 7, 1991.

any seer. Still, history is another word for experience. Historians have a responsibility for sharing their perceptions of the past. Change is slower than most futurists will admit, and, as the classics reveal, human relations seem almost to be set in amber. Those who predict the end of history, the flowering of a new world order, or the certainty of a rational separation of Quebec from Canada may be right, but few historians would risk their savings on such outcomes.

The paper José Woehrling presented to Quebec's Bélanger-Campeau Commission seems to offer a generally reassuring view of the legal possibilities of Quebec secession.[2] He suggests that, if Canada submitted to his eminently civilized advice to accept an unambiguous demand from Quebec for sovereignty, the former would have virtually no legal rights in the successor state. The new government of a sovereign Quebec would acquire all federal assets within its boundaries, including those that might have been hurriedly transferred by sympathizers in the federal cabinet or bureaucracy.[3] In the past year, these have included a major new naval headquarters in Quebec City, concentration of half of Canada's CF-18 fighter aircraft at Bagotville, and plans to transfer almost all of Canada's mobilization stores to Montreal. At the same time, since Ottawa has not ratified the 1983 Vienna convention, Quebec would have no obligation whatever to share a federal debt incurred, to some degree, in acquiring those assets. Nor would Quebec have any special responsibility for those of its newly defined citizens who had been federal employees. Admittedly, the current leaders of the Parti

2 José Woehrling, "Les aspects juridiques de la redéfinition du status politique et constitutionnelle du Québec," in Quebec, Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut constitutionnel du Québec* [Background papers], vol. 2 (Quebec, 1991), pp. 1–110; and John McCallum in this volume.

3 See Woehrling, p. 74. Because of efforts in the past two generations to extend National Capital institutions from Ottawa to Hull, Quebec's inheritance would include the Canadian Museum of Civilization and potentially the National Archives of Canada, whose new site in Pointe-Gatineau has been ardently promoted by the national archivist, Dr. Jean-Pierre Wallot.

Québécois do not contemplate such a challenge to 20 million continuing Canadians; the Bélanger-Campeau Commission was advised that 18.6 percent would be a fair share of Canada's huge public debt for Quebec to assume.[4] Other Canadians, perhaps unfairly convinced that Quebec has been a major beneficiary of federal spending, will regard 18.6 percent as a bargaining position. As Stanley Hartt argues, if the major issues in Canada-Quebec negotiations cannot be resolved quickly because one or both sides begin from unrealistic positions, what hope is there of a quick and minimally disruptive resolution of a myriad of other issues? Much depends on reciprocal good feeling.[5]

The most fascinating paradox tucked into the Woehrling paper is the observation that, although a successor state has impressive rights and few obligations, the original state has every right to attempt to maintain its integrity, including the right to use force. Although few Canadians can now conceive of a situation in which Quebec or any other region would be coerced to remain in Confederation and although Canada's shrinking and effectively binational armed forces would have little capacity for mounting any effective coercion, the legal right exists and the possibility of exercising it would grow once the majority was persuaded to believe that its vital interests were affected. That is precisely what has happened in other countries where secession has been attempted, with or without success.

One reason for an angry response is that majorities may be contemptuous or even blissfully unaware of how seriously secession is contemplated until it is very close to happening. Observers of the

4 The proposal is presented in Secretariat of the Bélanger- Campeau Commission, "Analyse pro forma des finances publiques dans l'hypothèse de la souveraineté du Québec," in Bélanger-Campeau Commission, *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 1 (Quebec, 1991). It is accompanied by a strategic plan to alter the distribution and valuation of assets to Quebec's benefit, as well as a vaguer proposition that any liabilities assumed should be set against assets acquired by funds originating in Quebec. From some experience of testing these propositions with anglophone groups and individuals otherwise enthusiastic about Quebec's departure, I know they are not likely to be very popular when more fully understood.

5 Stanley Hartt, in this volume.

Canadian scene will find plenty of evidence that many Canadians still believe that Quebec is bluffing about independence — partly because serious discussion of that eventuality has been suppressed in the kindly interests of "not inflaming the situation." Others, notably in the West, regard it as pain-free, though on terms likely to be utterly intolerable to most Québécois.[6]

The Law, Politics, or Merely Mayhem?

Canada's *Constitution Act* makes no provision for secession. In its 1867 manifestation as the *British North America Act*, any such provision would have been seized on by Nova Scotia, the most reluctant partner in the new Confederation. No such opportunity was allowed. In 1886, W.S. Fielding, the province's Liberal premier, fought and won sweeping re-election in Nova Scotia on the promise of repealing Confederation in favor of a Maritime Union. The provincial assembly, on the motion of the attorney general, dutifully resolved in favor of repeal and passed on to other business. For good or ill, the Fielding government had adopted no plan for imposing its policy on Ottawa or for gaining support from other provinces or in Great Britain. If there was an impasse, it vanished in the 1887 federal election when, for assorted reasons, Nova Scotia gave the federal Conservatives 14 of its 21 seats and a clear majority of its votes.

Although Canada's current Constitution could be amended by Parliament and either seven or ten provinces to introduce a basis for provincial secession, the 1982 amending process has been profoundly discredited by the fate of the Meech Lake Accord. The criticism that decisive power was left to a small number of politicians may be profound or absurd, but broadening the process to include participation by the territories, native peoples, women's groups, or anyone else has not made action easier. It is by no means clear that a matter as significant as the secession of a province could be settled

6 See David J. Bercuson and Barry Cooper, *Deconfederation: Canada without Quebec* (Toronto: Key Porter Books, 1991), pp. 147–157.

by Ottawa and only seven of the provinces, yet is it likely that unanimity could be sustained for a three-year period? If Quebec secedes on the terms Professor Woehrling describes, politics, not law, will have to settle the matter.

Indeed, politics, not law, has been the common denominator of a host of secessionist experiences relevant to a possible Canadian breakup. The politics of secession has turned, with fatal frequency, to violence, repression, terror, and warfare. Canada itself was created during the most murderous and devastating war in the history of the United States. Yet, in 1860, many Americans had regarded such a war as inconceivable. President James Buchanan had insisted that, although secession was unconstitutional, it was also unconstitutional to stop it. His successor's decision to send supplies to the garrison of Fort Sumter — and the decision by a South Carolina general to open fire — unleashed a war that ended only after 618,000 of a population of 32 million had perished. The Canadian fathers of Confederation believed that they had done all in their power to safeguard their creation from the besetting sins of their neighbor: too many states rights and too much democracy.

Canadians have sometimes been more than spectators of other struggles for ethnonational self-determination. Massive Irish emigration to Canada helped involve Canadians in the bitter nineteenth-century debates over home rule, the armed struggle from 1918 to 1921, the ensuing civil war, and the seemingly insoluble conflict in Northern Ireland. The ethnically diverse immigrations of the 1890s and particularly in the years since World War II have linked a growing number of Canadians to European struggles for self- determination from Finland and the Baltic states to the present-day conflict in Azerbaijan. The 1967–70 struggle of Biafra to secede from Nigeria, with a cost of half a million lives, engaged the emotions of a surprising number of Canadians.[7] Canada's earliest commitment

7 The Trudeau government's consciousness of Canada's own fissiparous tendencies led it to discountenance strong and emotional pressures to sympathize with Biafra. The Mulroney government showed less prudence and more susceptibility to special interests by hastening to recognize the Baltic republics, Ukraine, and the seceding elements of Yugoslavia. Separatists everywhere took note.

to any form of peacekeeping began in Kashmir, a state torn by fighting in 1947 between pro-Pakistan Moslems and an Indian Army determined to protect the integrity of its new country. Emigration from Southeast Asia has involved Canadians in secessionist struggles from Bangladesh and Sri Lanka's Tamil Eelam to the current bid to turn the Punjab into an independent Khalistan.

Examining secessionist struggles encourages some sad conclusions. Instinctively, people echo the sympathy of Lord Byron or William Ewart Gladstone for people struggling to be free. From a safe distance, outside opinion endows rebels with romantic virtues and judges their repressors with frigid suspicion.[8] In such circumstances, extremist violence is hard to avoid. Breaking up a state, even a fragile and impoverished ex-colony, has inspired armed struggle ranging from terrorist assaults and police brutality to the full panoply of war. Of the world's 21 million dead in warfare since 1945, the vast majority have perished in some form of ethnonational struggle for independence, from the civil war in the southern Sudan to North Vietnam's ultimately successful attempt to rebuild the ancient Annamite empire. At the time of India's independence, the existence of what was East Bengal and is now Bangladesh had been the strongest single reason for the British to allow a separate Moslem Pakistan. That gesture to minority self-determination cost a million lives. Bangladesh's own secession in 1971 began with a savage civil war and a million refugees and ended only after India launched its third war with Pakistan. In 1991, Europeans found themselves almost powerless to prevent civil war over the secession of Croatia from the Yugoslav federation. Significantly, the Serbian minority could contemplate the departure of an ethnically more homogeneous and landlocked Slovenia, but Croatia, with its large Serbian minorities and its near-monopoly of Adriatic seaports was a different and bloodier question. Yugoslavia's brutal experience has set precedents for kindred tragedies in Rumania, Hungary, Czechoslovakia, and

8 Guerrillas are often forgiven brutalities that would seem inexcusable in police or soldiers.

around the frontiers of the former Soviet Union. In 1992, a second civil war, in Bosnia and Hercegovina, is impending.

There are a few examples of bloodless secession in our bloodthirsty century. In 1906, Panama broke away from Colombia, at least partly because Washington wanted a more biddable host for its proposed canal. A U.S. gunboat discouraged Colombian troops from restoring their government's authority.

A more reputable example may be Norway's separation from Sweden only a year earlier. A few details may clarify a special situation. In 1815, in the wake of the Napoleonic wars, Norway had been stripped from a pro-Napoleonic Denmark and handed to Sweden as compensation for the Finnish provinces the Russian tsar had grabbed for himself. The connection was purely to the Swedish royal house. Complete with its own parliament, army, navy, and judiciary, Norway was autonomous in all but foreign policy. The 1905 split came after decades of Norwegian demands and Swedish compromises. In the final crisis, Sweden mobilized and invaded. The European powers showed their disapproval, as they would to the Yugoslav army 85 years later. Unaffected financially or economically by Norwegian secession, the Swedes reluctantly accepted the situation, ensured their security by seizing Norwegian fortresses and insisting on a disarmed frontier, and withdrew to let their pride heal. Some 40 years later, a British official publication on Norway observed that Sweden's "deep feeling of animosity" was "converted into a powerful national movement directed towards the strengthening of the kingdom in whatever directions it might have suffered by the dissolution of the union."[9]

Canada and Quebec are not Sweden and Norway. Confederation was a voluntary agreement, and it is now a century and a quarter old. It has given Canadians an impressive standard of living and enviable freedoms. Quebec is integral to a country that fulfilled its version of manifest destiny by extending *a mari usque ad mare*. Without Quebec, would there really be a Canada? For most of Canada's

9 Great Britain, The Admiralty, *Norway*, vol. 1 (London, 1943), p. 194.

history, its prosperity has depended on the unified market created by its two largest, most industrialized and urbanized provinces, Ontario and Quebec. During most of the time since 1840, Canada's government has been a partnership in which the Québécois have shared and sometimes even dominated the majority — as Cartier confidently predicted they would.

Quebec is a distinct community for many reasons, chiefly because its population is overwhelmingly French-speaking. Yet it also has a substantial English-speaking minority, which is matched by a numerically larger French-speaking minority in the rest of Canada. Although economic and political factors could contribute to real conflict, the existence of these "hostage populations," with their potential for exploitation, is probably the single most explosive element in Quebec-Canada relations. A second element, the native peoples, is of comparable significance because of the strategic location of some major native settlements in territory that Quebec hopes to exploit for its resource potential and that, at the same time, could be challenged as outside the narrow boundaries of Quebec at the time of Confederation in 1867. Nor is it yet clear that Quebec renounces any claim to Labrador. Permitting the Cree to remain Canadian is irrelevant unless their extensive territories are Canadian too.

Swedes and Norwegians could eschew serious violence in the summer of 1905 because not much of substance was at stake. The two countries shared little more than a king and a difficult mountainous border. There were few financial or economic links; even the national debts were distinct. Such situations are rare. Ireland's progress to republican independence was bedeviled by the fears of a Protestant minority and by the threat that a hostile Ireland could pose to Britain's sea lanes. (Although it is commonly claimed that the fears were grossly exaggerated, the exodus of Protestants after the 1921 settlement was Ireland's largest population movement in this century.)[10] France's struggle to retain Algeria was intensified by

10 Donald H. Akenson, *Small Differences: Irish Catholics and Irish Protestants, 1815–1922: An International Perspective* (Montreal; Kingston: McGill-Queen's University Press, 1988), p. 4.

the plight of the *pieds-noirs*, French settlers with no other obvious home; loyal colonial troops, with no role after France's withdrawal, were left behind — often to be massacred. Large alien minorities in the dissident republics of the former Soviet Union complicated the secession movements of Lithuania, Ukraine, Kazakhstan, Azerbaijan, and Georgia and the final outcome is blessedly invisible in mid-1992.

Regions seeking independence often have vital resources. Biafra's successful secession would have removed Nigeria's oil wealth and left Africa's most populous country an economic cripple. Ethiopia fought to hold Eritrea as its sole access to the sea. Croatian ports serve the same vital role for Serbia. The Basque region, permeated by a separatist movement with a terrorist wing, includes much of Spain's heavy industry. Part of Canada's wealth is the highly integrated economy of its central provinces. Whatever péquistes tell Québécois, that integration would be jeopardized by the separation of citizenship and currencies inherent in national sovereignty.

In a rational world, the rights of ethnic minorities can be protected, access to seaports can be guaranteed, and resource wealth can and should be shared. Is the world rational? Is the profoundly emotional appeal of ethnonationalism susceptible to rational compromise? Can those who seek self-determination as their own inalienable right concede that right to their own minorities? There might be a first time. Are Québécois and Canadians so passionless and objective that they can count on an amicable and uncontested divorce? If so, why would they bother?

The Concept of Self-Determination

Professor Woehrling seeks a right to self-determination in international law. Like Nova Scotia's Fielding, he might be better advised to hunt for it in politics, and his search may still be long and confusing. Perhaps it is worth looking again at the origin and application of this most elusive of political concepts.

The phrase "self-determination," so often dated from President Woodrow Wilson's statement of the United States' peace aims in

World War I, appears nowhere among those "Fourteen Points." Perhaps Wilson came closest in number 5, calling for:

> A free, open-minded and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty, the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.[11]

In other points, Wilson insisted that unambiguous boundaries could be drawn around the Italians, French, Romanians, and other major European nationalities. A more explicit statement of Wilson's version of self-determination appears in his draft of a covenant for the proposed League of Nations:

> The Contracting Powers unite in granting to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgement of three-fourths of the Delegates be demanded by the welfare and manifest interests of the peoples concerned, may be effected if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.[12]

Needless to say, Wilson's bewildering prose did not reach the League Covenant, but it is worth quoting as a reminder that even the

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11 United States, Department of State, *Papers Relating to Foreign Affairs of the United States, 1918*, supplement 1: *The World War*, vol. 1, p. 406.

12 E. David Cronon, *The Political Thought of Woodrow Wilson* (Indianapolis, Ind.: Bobbs-Merrill, 1965), p. 455.

putative father of the concept glimpsed how dangerous his offspring could be.

The interwar years were packed with evidence of that danger. Amid the collapse of four historic empires, the map of Europe and the Middle East was redrafted to make room for a score of new states, from Finland and Estonia to Oman and Qatar. Some, such as Armenia and Georgia, promptly vanished again. Almost all the successor states lived in a turmoil of ethnic discontent, as Polish, Slovak, Ukrainian, and Kurdish minorities asserted their equal claim to self-determination. Why, when other Arabs had their League-guaranteed boundaries, was Palestine held open for the Jewish state Arthur Balfour had promised in 1917? Why were Catholic Croats and Moslem Bosnians locked in a Yugoslavia dominated by Orthodox Serbs?

No politician proved more skillful in urging the principle of self-determination than Adolf Hitler. Germans, too, were a people rightly struggling to be free, whether in the Saarland, the Sudeten, or Danzig. So, in due course, were Croatians, Ukrainians, and other nationalities conveniently allied to the Nazis as co-defenders of the principle of self-determination. When Canadians, among others, viewed the League, they saw it as the guarantor of ill- managed and oppressive successor states, and their minds turned to isolationism.

As the best hope of the post-Hitlerian world, the United Nations embraced a view of self-determination both more visionary and more constrained. The new superpowers and their allies had no desire to remake the boundaries World War II had created in 1945. Article 1 (2) of the U.N. Charter promised "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." It is a section cited most often in defense of noninterference in members' domestic affairs. It was when the charter turned to colonies and trust territories that self-determination was acknowledged as a basis for changing governments. As history would soon prove, such changes would occur essentially within the boundaries carved by the colonial powers themselves. British India was an exception (with bloody consequences); Burma and Ceylon were not.

Like other popular political phrases, "self-determination" became a slogan in Cold War arguments, to be applied to populations in Soviet satellites and, increasingly, to the colonized and oppressed of the Third World. The growing Third World bloc at the United Nations had no patience with Rhodesia's unilateral declaration of independence, phrased though it was in the language of the U.S. Declaration of Independence. As in U.N. resolutions on South Africa's apartheid regime, self-determination was a right of the black majority, not of white settlers. On the other hand, the Third World bloc favored Argentine claims to the Malvinas over the unanimous claims of the small but indigenous population of the Falklands.

In short, although there may be lawyers sufficiently ingenious to trace a consistency in United Nations doctrine on self-determination, the easiest explanation is political expediency flavored with opportune moral outrage. The term, concludes Ritchie Ovendale,

> is now so emotive and subject to so many different interpretations, legal and political, as to be almost worthless. But it still exists, and "peoples" who see themselves as repressed minorities or majorities have continually resorted to it as a justification for terrorism, rebellion and civil war.[13]

A country whose leaders, editors, and good-hearted folk hasten to concede the right of "self-determination" to Quebec, to First Nations, and to national struggles around the world, displays some of the ahistorical innocence that has brought the prospect of Canada's disintegration closer.

Adult Preoccupations

Both history and politics are adult occupations. They are frequently presented as though their participants shared the mental age and innocence of a television audience. By refusing to consider the real

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13 R. Ovendale, "Self-Determination," *World Encyclopedia of Peace* (Oxford: Pergamon Press, 1986), vol. 2, p. 373.

costs of sovereignty, the Parti Québécois treats its supporters like children who must be fed on illusions; so do those political and media elites in English Canada who have refused to consider both the certain and the possible consequences of a Canadian breakup.

Having weighed the costs and risks, the Québécois may, for a variety of reasons, choose the difficult path to sovereignty. The rest of Canada, unwilling so far to contemplate constitutional changes that might have made Quebec a distinctive participant in the nation's political and economic structures, may have to negotiate a new, difficult, expensive, but workable, relationship. This will be not the Reform Party's Golden Age of the 1950s but an awkward, costly second-best to what all Canadians enjoy now.

Bernard Landry, vice-president of the Parti Québécois, has insisted that a country with Canada's long experience of democracy and the rule of law is uniquely fitted to work out the relationships that he and his colleagues anticipate. He and his colleagues characterize any attempts to anticipate the difficulties and dangers of breaking up Canada as "terrorism." Certainly no country can prosper in an atmosphere of coercion. The test of our democratic maturity, however, is not our capacity to blind ourselves to real risks and harsh realities but our ability to face them honestly. If we cannot do so, we increase the probability of a scenario of conflict, damage, and potential violence that almost everyone would deplore and most prefer to ignore.

We may also come to see that the best outcome after all is to go on living together, as we have with considerable prosperity, unusual freedom, and impressive success for a century and a quarter.

Quebec's Democratic Right to Self-Determination: *A Critical and Legal Reflection*

Daniel Turp

In his "Reflections on the Breakup of Canada, Conflict, and Self-Determination," historian Desmond Morton, obviously annoyed by an exercise based on the assumption that Canada will break up, addresses various issues arising from the working document drawn up by José Woehrling for the Bélanger-Campeau Commission.[1] It is difficult to understand why the editor of "The Canada Round" series did not ask a well-known jurist to analyze Woehrling's study, which is essentially designed as a legal document and deserves to be analyzed within the context of constitutional and international law.

In dealing with the issue of state succession at the beginning of his text, Morton seems content simply to describe some of Woehrling's conclusions without really judging them. For example, with regard to the obligations of a sovereign Quebec *vis-à-vis* the federal debt, Morton merely asserts that the leaders of an independent Quebec might not want to take advantage of the rigor of the body of international law concerning state succession, which tends to limit significantly the obligations of a successor state for the debt of the preceding state. The Bélanger-Campeau Commission estimates 18.6 percent as the portion of the federal debt that Quebec might

1 José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec," in Commission on the Political and Constitutional Future of Quebec [Bélanger-Campeau Commission], *Éléments d'analyse institutionelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec* [Background papers], vol. 2, (Quebec, 1991), pp. 1–110.

fairly assume, a percentage that other Canadians consider a negotiating position, according to Morton. These assertions are too brief and legalistic to warrant further comment, but it is comforting to note that, in this case, the publisher did call on jurists Daniel Desjardins and Claude Gendron, who present a high-quality legal summary and place the debate regarding Quebec's succession to the property and debts of the Canadian state in its appropriate legal context.[2]

In his introductory comments, Morton also tries to find a paradox between the international law of state succession, which confers impressive rights and imposes few obligations on the successor state, and the right of the originating state to use force to maintain its integrity. In fact, there is no paradox here. The rules of succession apply only when a state arises from a process of decolonization or separation; moreover, the latter often results from the refusal of a state to resort to arms to oppose a secession or from the failure of force to resolve the situation.

This reference to the right of the state to maintain its integrity provides Morton with the opportunity to assert that the possibility of coercing Quebec to remain within Confederation "would grow once the *majority* was persuaded to believe that its vital interests were affected"[my italics]. The reference to using violence[3] also allows him to head one section "The Law, Politics, or Merely Mayhem." In it, he argues that the issue of secession will be settled more in political than in legal terms.

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2 Daniel Desjardins and Claude Gendron, "Legal Issues Concerning the Division of Assets and Debt in State Succession: The Canada-Quebec Debate," in Paul Boothe et al., *Closing the Books: Dividing Federal Assets and Debt If Canada Breaks Up*, The Canada Round 8 (Toronto: C.D. Howe Institute, 1991).

3 Morton is not the only commentator to raise the specter of violence. See, for example, J.E. Arnett, "The Québécois Can't Take It All with Them," *Globe and Mail* (Toronto), October 10, 1991, p. A-19; see also the presentation by McGill University professor Stephen Scott to the Commission d'étude des questions afférentes à la souveraineté du Québec (CÉAS), in Québec, Assemblée Nationale, 34th legislature, 1st session, *Journal des débats*, November 26, 1991, no. 10, p. CÉAS-253. For a commentary on these views, see S. Langlois, "Intégrité territoriale et souveraineté," *Le Devoir* (Montreal), November 27 and 28, 1991, p. B-8; and G. Bergeron, "Le muffle de la violence: de grâce, que personne n'en rajoute!" *Le Devoir* (Montreal), January 31, 1992, p. B-8.

In this section, Morton examines secessionist experiences selected mainly from among those that have been characterized by violence, repression, terror, and armed conflict. He dredges up the most murderous episodes, from the American Civil War to the conflict that led to the creation of Bangladesh, and reminds readers of the struggles of the Irish and the Biafran people to attain sovereignty. His memory becomes much more selective when he cites a "few examples of bloodless secession": the withdrawal of Norway from the Kingdom of Sweden in 1905 and the separation of Panama from Colombia during the same era. He attempts to set these examples apart, rejecting their pertinence to the Canada-Quebec context without first having rejected the violent secessionist episodes with the same vigor. Moreover, there is no mention of the peaceful secession of Senegal from the Federation of Mali or of Singapore's achieving its independence in conformity with the Malaysian constitution.

Finally, the historian alludes to the Croatian and Eritrean claims and to the violence with which they were opposed. The purpose of these allusions is to reduce to the ranks of ethnic minorities peoples who claim the right to form a state, as well as to question the capacity of states to be motivated by reason or to respect the "profoundly emotional appeal of ethnonationalism" by recognizing the existence of a right to self-determination in the international legal order.

It is this concept of self-determination that Morton analyzes in the second part of his essay. Here again, he invites the reader to consider politics rather than the right of peoples to self-determination.

The historian analyzes self-determination from an historical viewpoint, stressing, to his credit, the importance accorded it by President Woodrow Wilson and the role it played in determining the geopolitical map of Europe and the Middle East following World War I. He also describes — perhaps because of current imperatives — how the concept was abused by Adolf Hitler and his Croatian and Ukrainian allies, who became "co-defenders of the principle of self-determination."

Morton continues his analysis of the concept with a reference of its inclusion in article 1 of the United Nations Charter and its use

in reinforcing the U.N. principle of nonintervention in domestic affairs. The historian recognizes that the concept of self-determination helped to advance to the decolonization process, but he tends to want to reduce it to a sentence or a slogan; in his view, the manner in which the concept was variously applied in Eastern Europe, Rhodesia, South Africa, and the Falklands/Malvinas demonstrates that it services "political expediency flavored with opportune moral outrage."

Morton then harks back to the theme of violence, quoting Ritchie Ovendale, who concludes in the *World Encyclopedia of Peace* that self-determination

> is now so emotive and subject to so many different interpretations, legal and political, as to be almost worthless. But it still exists, and "peoples" who see themselves as repressed minorities or majorities have continually resorted to it as a justification for terrorism, rebellion and civil war.[4]

It is disappointing, to say the least, to see Morton end his contribution on such a note and support a conclusion that is totally unacceptable in the current Canadian context. Although the Québécois people may support the concept of self-determination and assert their right to determine their own future, they have never invoked the principle of self-determination to justify violence. Indeed, in October 1970, when some individuals wanted to promote Quebec sovereignty through nondemocratic means, this option was emphatically rejected.

On the contrary, the people of Quebec have consistently turned to self-determination to advance their political status and to place within a legal context the democratic processes they have created for that determination. It is this practice, as well as international practice — whose modern evolution Morton chooses to ignore — that has progressively transformed the concept into a rule of law, such that the right of peoples to self-determination has become, in both Cana-

4 R. Ovendale, "Self-Determination," *World Encyclopedia of Peace* (Oxford: Pergamon Press, 1986), vol. 2, p. 373.

dian and international law, an instrument that would allow Quebec to accede legally to international sovereignty.

To put the point bluntly, Quebec has a right to accede to sovereignty that is based on the standards of Canadian law. Superimposed on these standards are rules of international law, which Quebec could invoke in its favor if Canada objected to a democratically sanctioned approach to sovereignty.

The goals of this paper are thus to place the debate in the legal framework appropriate for such a work[5] and to present my own reflections on self-determination.[6] I shall first look at Quebec's right to self-determination under Canadian law and then turn to its right to self-determination as recognized by international law. Finally, I shall consider how the right of the Quebec people to self-determination relates to that of the native nations within the boundaries of Quebec, to the individual and collective rights of the English-speaking minority in Quebec, and to the recognition of Quebec as a "distinct society."[7]

Self-Determination under Canadian Law

It is true that, as Desmond Morton asserts, neither the *Constitution Act*, 1982, nor any of its predecessors contains any provisions about self-determination or secession. Yet it can be said that a constitutional

5 Among the studies that could have inspired Morton's analysis are those of J. Brossard, *L'accession à la souveraineté et le cas du Québec* (Montreal: Presse de l'Université de Montréal, 1976); R. Chaput, "Du rapport Durham au rapport Brossard," *Cahiers de droit* 20 (1979): 289; and D. Turp, "Le droit de sécession en droit international public," *Canadian Yearbook of International Law* 20 (1982): 24–78; as well as the comments of D. Matas, "Can Quebec Separate?" *McGill Law Journal* 21 (1975): 387–403; M. Greenwood, "The Legal Secession of Quebec," *University of British Columbia Law Review* 12 (1978): 72–84; and J. Clayton and J. Whyte, "Legal Aspects of Quebec's Claim for Independence," in R. Simeon, ed., *Must Canada Fail?* (Montreal and London: McGill-Queen's University Press, 1977), pp. 259–280.

6 This reflection is drawn from my brief to CÉAS, *Journal des débats*, October 9, 1991, no. 5, pp. CÉAS-128 ff.

7 This third section of the paper was written at the request of series editor John McCallum to follow up on the comments of various reviewers.

convention has evolved in practice regarding Quebec's right to self-determination. This right is not only a *fait accompli* on the political level, as suggested by the secretariat of the Commission d'étude des questions afférentes à l'accession à la souveraineté du Québec (CÉAS) in its working paper on the process of acceding to sovereignty.[8] It also has a basis in Canadian constitutional law. This thesis, which is supported by many jurists,[9] and which has never been clearly refuted,[10] is based on precedents.

It is important to remember here that the Canadian governments and parliaments acquiesced to the 1980 referendum and thus recognized Quebec's right to decide its own political status.[11] Many

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8 CÉAS, *L'accession à la souveraineté: le processus* (Quebec: October 8, 1991), p. 6.

9 See, for example, J.-M. Arbour, "Le droit international permet la reconnaissance d'une déclaration unilatérale d'indépendance," *Le Soleil* (Quebec), October 9, 1990 and G. Otis, "Québec peut-il négocier à deux," *Le Devoir* (Montreal), December 18, 1991, p. B-8. The latter states:

> There are very good reasons for thinking that the traditional principle recognizing the Québécois' right to self-determination allows for bypassing the legal mechanisms of the law of 1982 [the *Constitution Act*]. Since the end of the 1970s, a consensus has developed in Canada regarding the possibility of the Québécois' choosing their own status in relation to the Canadian federation. [My translation.]

This position is mine. It is also one that Professor Henri Brun supported before CÉAS (*Journal des débats*, October 9, 1991, no. 5, p. CÉAS-130, and November 26, 1991, no. 10, p. CÉAS-270).

10 Indeed, when Stephen Scott appeared before CÉAS, he did not speak on this issue despite an invitation to do so from MNA Jacques Brassard. Scott was content to state that independence should be achieved while respecting the Constitution and using Canadian constitutional amendment processes. He took no position on what would be the appropriate mechanism (Scott, pp. CÉAS-250, 253).

11 For an analysis of Pierre Elliott Trudeau's position on this issue, see M. Adam, "Le droit à la libre disposition du Québec a été reconnu par P. Trudeau," *La Presse* (Montreal), August 15, 1991, p. B-2.

In *Notes pour une intervention de monsieur René Lévesque à la rencontre des premiers ministres* in Ottawa on June 9, 1980, Premier René Lévesque declared:

> At the time of the May 20, 1980, referendum, for the first time, Quebecers exercised their right to self-determination. This exercise took place — democratically and legally — and was recognized as such by the rest of Canada and the premiers of several provinces got involved personally. It was also recognized by the international community, which was keenly interested in the issue. [Note continues.]

of the statements made by political parties and leaders at that time and repeated during the debates surrounding the constitutional reform attempts that took place between 1980 and 1991[12] constitute additional precedents that lean toward such a constitutional convention. The Conservative Party's 1991 confirmation of Quebec's right to self-determination[13] and its hesitation to hold a pan-Canadian

Note 11 - cont'd.

> The obvious recognition of this right is the most precious thing to come out of the referendum. Whatever the result, it is uncontested and uncontestable that Quebec has a distinct national community that can choose for itself, without outside interference, its own constitutional status. Quebecers can decide to remain within Canadian Confederation or democratically decide to separate from it if they deem that this system no longer corresponds to their aspirations or to their needs. This right to control their own national destiny is the most fundamental right the Quebec people have. [My translation.] (Reprinted in Québec, ministère des Affaires Intergouvernementales, Commission de la présidence et de la constitution, *Dossier sur les discussions constitutionnelles* [Quebec, August 14–15, 1980], p. 23.)

12 See, for example, the statement by Pierre Marc Johnson, the Quebec minister for intergovernmental affairs, in which he maintained that "the right to self-determination was the foundation of Quebec's collective existence" and "that it [self-determination] was not negotiable." Reprinted in G. Lesage, "Johnson: Le droit à l'autodétermination ne se négocie pas," *Le Devoir* (Montreal), December 21, 1984. See also Premier Robert Bourassa's declaration that "all those who participated in the 1980 referendum, both Liberals and Péquistes, recognize Quebec's right to self-determination. The referendum was the expression of this right." Reported in P. O'Neill, "Le dilemme de Robert Bourassa: satisfaire les libéraux ou couper les dépenses," *Le Devoir* (Montreal), March 30, 1986, pp. 1, 8.

See also Lucien Bouchard's comment, "English Canada has no say in the future of Quebec." Reported in P. O'Neill, "Le Canada anglais n'a pas un mot à dire sur l'avenir du Québec, previent Lucien Bouchard," *Le Devoir* (Montreal), October 30, 1990, report A, p. A-3).

Finally, see Minister Gil Rémillard's assertation to Ontario Premier Bob Rae that Quebec has the right to self-determination. Reported in "C'est le droit à l'autodétermination qui n'est pas négociable, répondent libéraux et péquistes à Bob Rae," *Le Devoir* (Montreal), December 21, 1990, p. 13; and in "Quebec peut s'autodeterminer réplique Rémillard and Bob Rae, "*La Presse* (Montreal), December 22, 1990, p. B-3.

13 Conservative Party Convention, Resolution 244, August 9, 1991. It states: "the right of Quebecers to self-determination must be recognized." See also M.C. Lortie, "Autodétermination: l'oeuvre de l'aile Bouchard," *La Presse* (Montreal), August 10, 1991, p. A-12; and G. Fraser, "Tories Back Quebec's Right to Choose," *Globe and Mail* (Toronto), August 10, 1991, pp. A-1, A-3.

referendum that would affect Quebec's political and constitutional future[14] lean toward recognition of Quebec's right to self-determination *vis-à-vis* the rest of Canada.[15]

From these precedents, which reveal that the various parties intend to respect the will of the Quebec people and will feel bound by a decision they take on their own political status, there emerges a constitutional convention whose *raison d'être* is based on the principle of democracy[16] — a principle that has supraconstitutional value.[17]

Does this constitutional convention recognizing Quebec's right to self-determination include a right for Quebec to accede to sovereignty? Again, the precedents lean in this direction, seeming to take for granted that a possible avenue of self-determination for Quebec is accession to the status of a sovereign and independent state.

In this sense, the exercise of a right of secession by Quebec would be in accord with a constitutional convention. The existence of such a convention would then entail the obligation of making the constitutional amendments necessary to give it effect and thereby allow Quebec to withdraw from Confederation. In his study for the Bélanger-Campeau Commission, Woehrling concludes, based on opinions expressed by other Québécois[18] and Canadian[19] constitu-

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14 See V.C. Hébert, "Ottawa lâche du lest sur le projet de référendum," *Le Devoir* (Montreal), November 26, 1991, p. A-2.

15 Moreover, even though federal minister Benoît Bouchard would like to have a federal referendum law adopted, he admits that the decision regarding the political and constitutional future of Quebec belongs to Quebecers: "In no way would a federal referendum have the effect of reversing a decision made by Quebecers on their own future; if Quebecers vote in favor of Quebec sovereignty, the 55 Conservative MPs from Quebec would never accept the notion that a federal mechanism could change the decision of Quebecers." [My translation.] Reported in V.D. Lessard, "Référendum: "Ottawa n'a pas de permission à demander," *La Presse* (Montreal), November 29, 1991, p. B-1.

16 On the notion of constitutional convention and recourse to the principle of democracy as the *raison d'être* for a given rule, see J. Brun and G. Tremblay, *Droit constitutionnel*, 2d ed. (Montreal: Les Éditions Yvon Blais, 1990), pp. 45–46.

17 *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 725.

18 For example, Brun and Tremblay, *Droit constitutionnel*, p. 236.

19 For example, P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), pp.102–103.

tional experts, that the general constitutional amendment procedure would apply in this situation — that amendments to the Constitution would have to be approved by seven provinces representing half of the population.[20]

It could even be argued that should the rest of Canada refuse to make the appropriate constitutional amendments, a Quebec referendum on sovereignty would in itself constitute a mechanism for amending the Constitution. This argument is analogous to the one that the Constitution of Canada — notably the provisions concerning the amending formula — can in fact be amended by a referendum without regard for the formal amendment rules it contains. As with a referendum on the constitutional amendment procedure, the courts could, keeping in mind the decision in *Reference re Manitoba Language Rights*,[21] invoke the principle of democracy to give effect to a Quebec referendum; they would be authorizing violation of constitutional provisions that would prevent a people from exercising their right to sovereignty.

If one acknowledges the existence of such a constitutional convention, the right of the Quebec people to self-determination and to secession has a basis in Canadian law and the government of Canada would be obliged to act on a request from Quebec to withdraw from Confederation.

Self-Determination under International Law

If the federal government refused to act on its obligation and the courts sanctioned that refusal in violation of the eminently superior principle of democracy, then public international law might come to the aid of the Québécois and provide a legal basis for their right to self-determination.

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20 Woehrling, "Les aspects juridiques," p. 57.

21 Supra footnote 17.

Although Desmond Morton clearly hesitates to acknowledge such facts, public international law has, since 1945, recognized peoples' right to self-determination.

This right is recognized in a number of international treaties, which take two parallel routes. On the one hand, article 1-2 of the United Nations Charter asserts that the goals of the United Nations are "to develop friendly relations among nations based on respect for the principle of the equal rights and self-determination of peoples and to take any other appropriate measures designed to strengthen world peace." These goals are restated in article 55, and article 56 commits the member nations to act jointly and severally, in cooperation with the United Nations, to attain them.[22]

The U.N. General Assembly subsequently adopted numerous interpretative declarations concerning the right of peoples to self-determination. The leading declaration, adopted by consensus, is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (hereinafter, the Declaration on Friendly Relations), which reasserts the principle of the equality of the rights of peoples and their right to self-determination as established in the U.N. Charter.[23]

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22 Canada signed the United Nations Charter on June 26, 1945, and became a founding member of the United Nations on November 9, 1945, following the tabling of its ratification documents. For a study of the right of peoples to self-determination as established in the United Nations Charter, see S. Calegeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (Brussels: Bruylant, 1973), pp. 263 ff.

23 The first paragraph regarding the principle of equal rights of peoples and their right to self-determination reads:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

On the other hand, article 1, paragraph 1 of the two international human rights covenants,[24] states that "all peoples have the right to self-determination," while paragraph 3 stipulates that the states party to the covenants "shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

These international instruments provide a succinct definition of the right to self-determination. Although the U.N. Charter does not specify the contents of this right, the Declaration on Friendly Relations stipulates (in paragraph 3) that creation of a sovereign and independent state, free association or integration with an independent state, or acquisition of some other freely decided political status are all means through which a people can exercise the right to self-determination. The international human rights covenants stipulate that, under this right, peoples "freely determine their political status and freely ensure their economic, social and cultural development."

It is in this light that sovereignty is regarded as a means for peoples to exercise their right to self-determination, as stated in the U.N. Charter and as interpreted by the Declaration on Friendly Relations. Even the more general formula used in the international human rights covenants does not rule out creating a sovereign state as one method of achieving a freely determined political status.

Despite the efforts of publicists to establish the conditions under which peoples can exercise the right to self-determination,[25] an examination of international treaties in the light of their *travaux préparatoires* shows that they state only one condition for entitlement to the right: that of being a people.[26] The U.N. Charter, the Declara-

24 Namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. After obtaining the consent of all the provinces, including that of Quebec (expressed in a ratification decree signed on April 21, 1976), Canada adhered to these two treaties on May 19, 1976. They came into force in Canada on August 19, 1976.

25 See Brossard, "L'accession à la souveraineté," pp. 83–86.

26 Ibid., p. 84. For a more in-depth analysis of this single condition for exercising the right to self-determination, see Turp, "Le droit de sécession"; and Woehrling, "Les aspects juridiques," pp. 86–87.

tion on Friendly Relations, and the international human rights covenants do not, however, define the notion of "a people." This has led certain authors to assimilate the concept of "a people" to that of "a state" and to make the latter — rather than the peoples that make up the state — the holder of the right to self-determination.[27] Other commentators, basing their arguments on, among other things, the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, claim that only inhabitants of colonies qualify as peoples.[28]

Neither of these theses is acceptable in light of the subject and purpose of treaties that recognize the right of peoples to self-determination or in light of the preparatory documents and subsequent practice. In my opinion, the more plausible thesis is that of self-definition: a group of individuals who choose to determine their own future[29] qualify as a people and consequently are entitled to self-determination. A common language, culture, and religion play a determining role in the process of self-definition, but the collective desire to live together better defines a people.

Considering the sources, content, and conditions of exercising the right to self-determination in public international law, are the Quebec people entitled to self-determination? In applying this right, do they have the prerogative of attaining sovereignty and thereby seceding?

To answer these questions, it must be determined whether a process of self-definition has led to the emergence of a Quebec people and if they have the right of secession. The existence of a Quebec people has been asserted many times since 1960 and affirmed by motions and resolutions of the Quebec National Assem-

27 See, for example, J.-F. Guilhaudis, *Le droit des peuples à disposer d'eux-mêmes* (Grenoble: Presses de l'Université de Grenoble, 1976), p. 21. See also J. Charpentier, "Le droit des peuples à disposer d'eux-mêmes et le droit international positif," *Revue québécoise de droit international* 195 (1985): 200.

28 See A. Rigo-Sureda, *The Evolution of the Right of Self-Determination: A Study of the United Nations Practice* (Leiden: Sifthoff, 1973), pp. 110–111.

29 See C. Chaumont, "Le droit des peuples à témoigner d'eux-mêmes," *Annuaire du Tiers-Monde* (1976): 15.

bly,[30] by the laws it has passed,[31] and by the statements of ministers and first ministers.[32] These affirmations and the absence of protests from the rest of Canada[33] point to the existence of a Quebec people and, as a corollary, to its right of self-determination.[34]

Various acts of the National Assembly also confirm that Quebec considers itself the holder of this right, as evidenced by, among others, the *Act to Establish the Commission on the Political and Constitutional Future of Quebec*,[35] the *Act Regarding the Process of Determining the Political and Constitutional Future of Quebec)*,[36] and the motion of

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30 See, for example, the motion of November 19, 1981, in Québec, Assemblée Nationale, 32nd legislature, 3d session, *Feuilleton de l'Assemblée nationale du Québec*, pp.4–5.

31 Consider, for example, the Chartre de la langue française, preamble and section 1.

32 See, for example, the speech by Robert Bourassa, June 23, 1990, reprinted in *Le Devoir* (Montreal), June 24, 1990, p. 13. It ends by affirming that the premier's only guide will be "l'intérêt supérieur du *peuple québécois*" [the ultimate interest of the Québécois people].

33 Indeed, the Pepin-Robarts report noted the existence of a Quebec people in these terms:

> This transformation is reflected in the very vocabulary that Quebecers have used to describe themselves. Originally, the French-speaking people of Quebec called themselves *Canadiens* and referred to the English-speaking people as *les Anglais*. In the middle and late nineteenth century, they began calling themselves *Canadiens français* to distinguish themselves from English-speaking Canadians. In recent years, however, more and more have adopted the name and identity of *Québécois*, underlining this sense of themselves as a majority, as a people. (Canada, Task Force on Canadian Unity, *A Future Together*, chaired by Jean-Luc Pepin and John Robarts [Ottawa: Supply and Services Canada, January 1979], p. 25.)

34 See J.-Y. Morin, "La portée universelle du droit à l'autodétermination des Québécois," *Le Devoir* (Montreal), April 27–28, 1978, p. 5.

35 S.Q. 1990, c.34. Consider also the statement made by Canadian Intergovernmental Affairs Minister Gil Rémillard when the Bélanger-Campeau Commission was examining the brief presented by the Société québécoise de droit international: "My deep conviction, as a jurist, is that we have this right if Quebecers decide democratically to assume their future through sovereignty or independence, and nobody, no other people or nation can prevent them." [My translation.] (Québec, Assemblée Nationale, 34th legislature, 1st session, November 14, 1990, p. 324.)

36 S.Q. 1991, c. 34.

the National Assembly of November 27, 1991.[37] The terminology of these three acts was inspired by article 1 of the international human rights covenants. None of them has been protested by the government of Canada or contested on constitutional grounds.[38]

If Quebec's right to self-determination has been thus recognized and confirmed, would exercising it allow Quebec to accede to sovereignty? If the terms of the U.N. Charter and the international human rights covenants are interpreted in good faith, with common sense, and in light of their goal, taking into account the preparatory documents, one can say that the right to self-determination includes the right of secession. This interpretation results from the fact that the Charter, as interpreted by the Declaration on Friendly Relations, includes the right of a people to determine their own political status freely and to opt for the creation of a sovereign and independent state. The international human rights covenants do not place any restrictions on the political status that a people may choose, thus allowing for accession to the status of sovereign and independent state.[39]

The Declaration on Friendly Relations does contain a safeguard clause designed to give priority to the territorial integrity of non-colonial states. It states that the right to self-determination shall not be interpreted

> as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determina-

37 This motion "reaffirms the right [of] Quebecers to freely assume their own destiny and to freely determine their political and constitutional status." Reported in M. Venne, "Québec reconnaît à Ottawa le droit à une loi référendaire mais demande de ne pas l'utiliser," *Le Devoir* (Montreal), November 28, 1991, p. A-2).

38 International law expert André Patry said before CÉAS that the federal Parliament could have refused Quebec's right to accede to sovereignty "precisely one year after the referendum" by repudiating the *Loi sur le processus de détermination du statut politique et constitutionnel du Québec*. The refusal to proceed with such repudiation confirms Canada's recognition of Quebec's right to self-determination and secession (CÉAS, *Journal des débats*, November 7, 1991, no. 8, p. CÉAS-207–8.).

39 On the right of secession in general, see the remarkable work by L.C. Buccheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978). See also Turp, "Le droit de sécession," p. 24.

> tion of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

This provision has been variously interpreted. Jurisprudence tends to recognize in it the existence of a limited right of secession.[40] The interpretation that seems to me more in conformity with the object and goal of the Declaration, in light of its *travaux préparatoires*, is that peoples living in independent and sovereign noncolonial states may exercise a right of secession if these states are not conducting themselves in accordance with the right of their peoples to determine their political status within the state and to ensure their economic, social, and cultural development therein. As certain commentators on the Declaration on Friendly Relations have suggested, if a people are refused the right to self-determination domestically, they can exercise that right, particularly the right of secession, at an international level.[41]

The consequence of such an interpretation is that "all peoples" do not have the right to self-determination or to become sovereign and independent states. This interpretation would curtail a people's freedom to choose their political status. Thus, the provision seems to run counter to the universality of rights established by the U.N. Charter and more explicitly by the international covenants. One can, however, doubt the legal status of the safeguard clause in the Declaration on Friendly Relations and contest its customary character, particularly since the accession to sovereignty of the Baltic states,[42] other former Soviet republics,[43] and the Yugoslav Federated States.[44] The

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40 See Buccheit, *Secession*, pp. 92–93.

41 See, for example, Brossard, "L'accession à la souveraineté," pp. 99–109.

42 On the right to self-determination and the secession of the three Baltic republics, see W.C. Allison, "Self-Determination and Recent Developments in the Baltic States," *Denver Journal of International Law and Policy* 19 (1991): 625.

43 See "La Norvège et la Turquie reconnaissent les nouvelles républiques de la CÉI," *Le Devoir* (Montreal), December 17, 1991, p. A-7.

44 See "L'Allemagne reconnaît la Slovénie et la Croatie," *Le Devoir* (Montreal), December 20, 1991, p. A-7. See also the highly instructive notices (nos. 1, 2, and 3) of the Arbitration Commission of the Yugoslav Peace Conference, which examine the Yugoslav republics' exercise of their right to self-determination and state the conditions of recognizing their sovereignty.

consultations regarding elections or referenda in the Czech and Slovak republics[45] and in Eritrea[46] also point to the lack of any uniform and consistent practice along the lines of a ban on secession. On the contrary, a democratic right to secession is now coming to light; it tends to confirm the universality of the right of peoples to self-determination.[47]

Even if the right of secession may be exercised only by peoples who are refused the right to self-determination domestically, it can be argued that the passage of the *Constitution Act*, 1982, without the consent of the parliament and government of Quebec and the rejection of the Meech Lake Accord (and the five conditions set by Quebec) constitute a refusal to allow the Quebec people to exercise the right to self-determination domestically. Furthermore, refusal to give effect to the constitutional convention authorizing Quebec's accession to sovereignty would be a serious violation of democratic principles and would lead to the conclusion that the Canadian state was no longer conducting itself in conformity with Quebec's right of self-determination, thus giving the Quebec people the right of self-determination, including the right of secession, at the international level, in accordance with the U.N. Charter, as interpreted by the Declaration on Friendly Relations.

It can therefore be affirmed that Quebec's right to self-determination and independence, which is rooted in Canadian constitutional convention, is also sustained by modern international law, which can offer appropriate legal support for Quebec's claims.

Moreover, the recent experiences in the former Soviet Union and Yugoslavia show that political and legal arguments, particularly constitutional arguments, do not hold water when their only goal is

45 See "Havel appelle Tchèques et Slovaques à conclure un traité," *Le Devoir* (Montreal), November 12, 1991, p. A-6. See also C. Monroy, "Tchèques et Slovaques ne sont pas parvenus à un compromis sur l'avenir de la Fédération," *Le Monde* (Paris), November 15, 1991, p. 4.

46 *L'État du monde 1992* (Montreal: Éditions du Boréal, 1992), p. 289.

47 C.F. Brousseau, "Les défis de l'Europe entre l'ex-Yougoslavie et l'ex-URSS," *Le Devoir* (Montreal), September 11, 1991, p. 12.

to stifle individuals' claims for freedom and deny peoples the right of self-determination. Thus, if the Québécois democratically elect to build a sovereign state, the Canadian state will have to accept this exercise of self-determination,[48] and Quebec, like the new Baltic states, will see its approach supported by the international community.

Other Issues

Although the right of the Québécois to self-determination is established by both Canadian constitutional law and international public law, one must ask how the exercise of this right can be reconciled with the right of self-determination claimed by the native nations living on the present territory of Quebec, how Quebec must take into account the individual and collective rights of its English-speaking minority, and how the right to self-determination relates to the "distinct society" concept. These are the questions I shall attempt to answer in this third part of my analysis.

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48 This was what the Pepin-Robarts task force recommended in a conclusion that remains relevant:

> We believe that this practical consideration carries us to the heart of the issue, for in our judgement it is not a question of deciding in the abstract whether Quebec possesses a right of self-determination, but rather determining in the most practical manner possible what principles ought to govern Quebec's discussions with the rest of Canada as it faces the largest political decision it has had to make in the last century. If, in the course of the next few years, Quebecers decided, definitively and democratically, to secede, ought that decision to be respected and accepted by the rest of Canada?
>
> To that question we answer an unequivocal yes. Our response is a virtual corollary of our acceptance of the democratic process. Given a community of the size and character of Quebec society, we believe that the clearly expressed will of the population must prevail, and that it would be both unwise and ethically questionable to deny or thwart it. Practically speaking, this means the renunciation of the use of force to maintain the integrity of the Canadian state and a commitment to seek to construct political institutions which reflect the will and aspirations of the citizens concerned. We believe most Canadians and virtually all of the country's political leaders would share our view (Pepin-Robarts report, pp. 113–14).

The Native Nations

The relationship between the right to self-determination of the Québécois and that of the native nations raises highly complex legal and political issues. Although they were alluded to in several briefs presented to the CÉAS,[49] the discussions on these issues did not, in my opinion, yield any satisfactory solutions. I shall, therefore, endeavor to examine the legal aspect of this question in the light of the arguments I have already presented in responding to Desmond Morton's text. (One must bear in mind that I am looking at this matter from the perspective of the Québécois; the views of the native nations would be best presented by their own representatives and jurists.)

Although one can argue that Quebec's right to self-determination and secession is based on domestic Canadian law and rooted in a constitutional convention, I do not believe that any such claim may be made by the native nations. There is no precedent for such an agreement, the Canadian and the Quebec states not yet having recognized the existence of such a right. At the very most, one can say that existing ancestral rights and those granted by treaty are guaranteed by the *Constitution Act*, 1982, and that a resolution of the Quebec National Assembly (March 20, 1985) recognizes these same rights as set forth in the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement. This resolution also urges the Quebec government to enter into agreements with the native nations or any of their constituent bands in order to guarantee them the right to autonomy within Quebec and to allow them to develop as distinct nations having their own identity and exercising their rights within Quebec.

This right to self-government is also recognized in the September 1991 constitutional proposals of the government of Canada and is supported by the report of the Joint Committee of the Senate and the House of Commons on a Renewed Canada, which accedes to the

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49 See, for example, Dorion, CÉAS, *Journal des débats*, October 17, 1991, no. 6., pp. CÉAS-161–63; André Patry, pp. CÉAS-201–203; and Brun, pp. CÉAS-267–69.

natives' demand that this right be considered inherent. But this right, however inherent it may be, would be subject to a condition similar to that contained in the resolution of the Quebec National Assembly — namely, that it be exercised within Canada. Although the right to autonomy is thus in the process of being recognized (*in statu nascendi*), it cannot be considered equivalent to the general right to self-determination claimed and espoused by the native nations. Nor does this right to autonomy imply a right to secessionist self-determination, since it must be exercised *within* Quebec and Canada. This argument is reinforced by the fact that the practice that led to the emergence of Quebec's right to self-determination and independence under Canadian constitutional law recognizes unequivocally that the territory of a sovereign Quebec state would be that of the present territory of Quebec. Since the election of the Parti Québécois in 1976, no government, federal or provincial, has denied the right of a sovereign Quebec to territorial integrity. No government has espoused the arguments of those who suggest that sovereignty would mean depriving Quebec of the northern territories that were transferred to it in 1898 and 1912 or, even worse, reducing its territory to the shores of the St. Lawrence River.

The native nations are in a position similar to that of the Québécois when it comes to invoking international law in support of the claim that they have the right to self-determination. In view of the "nation" status of the native communities, unequivocally affirmed by their representatives and explicitly recognized by Quebec in the resolution of its National Assembly (and implicitly by Canada, excluding Quebec, in the *Constitution Act*, 1982, where the term "peoples" rather than "nations" is used), they may justifiably invoke for their own benefit the same international instruments as the Québécois — that is, the U.N. Charter and the international human rights covenants — to affirm their right to freely determine their political status and ensure their economic, social, and cultural development. The native nations of Quebec may thus claim that they meet the sole condition for enjoying this right and that they may therefore invoke the right to self-determination for their own benefit.

Such a right would allow the native nations to decide their political and constitutional future as freely as the Québécois, whether they choose creation of free and independent sovereign states, association or integration with an independent state, or acquisition of some other freely decided political status. In other words, by virtue of their right to self-determination, the native nations of Quebec could decide to attain sovereignty, to remain integrated with Canada, to stay with Quebec if it becomes sovereign, or to remain within Canada even if Quebec chooses sovereignty.

Should the native nations attain sovereignty or separate from Quebec to remain within Canada, there would be a problem of territorial integrity similar to that posed by the secession of Quebec from Canada. As I have already shown, however, the primacy of territorial integrity over the right to self-determination, as affirmed in the Declaration on Friendly Relations, is not absolute; it can be invoked in a case in which a people is refused the right to self-determination at the domestic level.

If it can be claimed that this right to self-determination was violated domestically in the case of Quebec, by the passage of the *Constitution Act*, 1982, without its consent and the rejection of the Meech Lake Accord, can the native nations invoke such a violation with respect to Quebec? While Canada refused to grant the native nations the right to self-government, which they demanded during the constitutional conferences from 1985 to 1987, Quebec formally recognized this right in regard to the Inuit, Cree, and Naskapi nations in the James Bay and Northern Quebec Agreement and in the Northeastern Quebec Agreement. So the territorial integrity of Quebec cannot be attacked on the grounds that it has violated the right of the native nations to self-determination within its borders.

Recall, however, that I have voiced serious reservations about the legal grounds for drawing a distinction between the internal right to self-determination and that conferred by international law, and that I have noted the emergence of a democratic right to secession that the native nations may invoke in the same way as the Québécois. In exercising their right to self-determination, the native

nations may, like Quebec, use consultation mechanisms to freely determine their political status, which could include exercising their right to democratic secession. If Quebec were to object to sovereignty measures democratically approved by the native nations, these nations could undoubtedly claim that their democratic right to self-determination and to secession had been violated.

Yet even if one agrees that both the Québécois and the native nations have the right to self-determination and to democratic secession, one must still face the territorial question, which could cause problems from the standpoint of international law. In the event that Quebec achieved sovereignty, these problems would be alleviated if the native nations freely agreed to be associated or integrated with the new Quebec state. On the other hand, if they wished to secede from Quebec to become sovereign states or to remain within Canada, these problems would become more complex. The territorial borders of the secessionist native nations would have to be determined, and the divergent views on the very existence of a territory belonging to a native nation, as well as on its boundaries, would have to be reconciled.

In this regard, one could argue that the Inuit, Cree, and Naskapi nations no longer have any territory of their own; by agreement, they gave up any rights they had over their land, and they cannot simply reappropriate it on the grounds that they are exercising their right to self-determination. Thus, the land transferred to Quebec in 1898 and 1912 on which the Inuit, Cree, and Naskapi nations live is part of the territory in respect of which Québécois people may exercise its right to self-determination and in respect of which it would, however, be willing to recognize the right to self-government. This argument would not hold, though, for the other native nations of Quebec, including the Attikamek, the Montagnais, and the Algonquins, which did not transfer their territories — although they are presently negotiating agreements with the Quebec government. This argument based on territorial rights as established by domestic public law is, however, hardly convincing insofar as the right to self-determination is claimed under international law, which does not

necessarily take domestic law into account if such law is an obstacle to the exercise of a people's right to self-determination.

The coexistence of native nations and the Québécois poses an additional problem in that they may have different views on what should become of their territory. For example, if the Abenaki, Algonquin, Attikamek, Huron, Malecite, Mohawk, Micmac, and Montagnais nations expressed a will to secede from Quebec, this desire could conflict with that of the majority of the population inhabiting the territories they share with the other Québécois. In the northern part of Quebec, where the Inuit, Cree, and Naskapi peoples, despite their small numbers, are in the majority on the lands they identify as theirs, the choice of the native majority as to the future of the territory could be decisive.

For the right of self-determination, it is up to the majority population of a given territory to determine its political status. This argument has been upheld by the International Court of Justice, as was pointed out by the native representatives appearing before the CÉAS.[50] Where members of the Québécois are in the majority, the future of such territories would likely be determined more by these individuals than by the native nations. On the other hand, where members of native nations are in the majority, the status of these territories would be freely determined by the majority of the individuals living there.

If the Québécois and the native nations were to claim the same land (as may well happen), arbitration would be necessary to ensure that all people living in the territory of Quebec were able to exercise the right of self-determination as established by international law. The recent experience in Yugoslavia is noteworthy. There, the tendency has been to favor the territorial integrity of the states resulting from the breakup of the Yugoslavian state and to give precedence to the right of self-determination of the people in the majority on a territory with pre-established borders. The arbitration commission

50 See CÉAS, *Journal des débats*, February 4, 1992, no. 24, p. CÉAS-705. In it, Richard Falk refers to the advisory opinion of the International Court of Justice in the *Western Sahara Case* [1975] I.C.J. Reports 12.

of the Peace Conference on Yugoslavia upheld the right of the new states to keep their former borders, especially if these borders were constitutionally protected before sovereignty was attained. But while ruling in favor of territorial integrity, the arbitration commission also emphasized the new states' obligation to ensure respect for basic human rights and freedoms. In the Quebec situation, this obligation would mean recognition not only of the rights of individuals belonging to the native nations but also the collective rights of these nations and, consequently, their right to self-government.

The English-Speaking Minority of Quebec

The legal opinions of the arbitration commission of the Peace Commission on Yugoslavia are also very pertinent to relations between the Québécois and the English-speaking minority of Quebec.

The situation of that minority differs greatly from that of the native nations. Like the French-speaking minorities in Canada, the English-speaking minority of Quebec does not qualify as a people. Consequently, it does not have the right to self-determination whereby it could decide to secede from an independent Quebec and join the rest of Canada. The English-speaking minority of Quebec has not asserted the characteristic of peoplehood in the same way as the Québécois or the native nations. Members of this group can invoke social and linguistic ties with individuals in the rest of Canada and have always considered themselves as belonging to a Canadian people or a Canadian nation. This is equally true for the French-speaking minorities of Canada, who have neither asserted themselves as a people nor considered themselves part of the Québécois or even of a French-Canadian nation — the latter no longer corresponds to a sociological reality, contrary to what the chief of the Assembly of First Nations would like to think.

The English-speaking minority of Quebec thus cannot claim a collective right to self-determination. Individuals belonging to this minority do, however, have individual rights that they could assert in a sovereign Quebec state. Indeed, the arbitration commission of

the Peace Conference on Yugoslavia clearly stated that minority rights must be protected by a new state. It appears, in fact, that protection of minority rights is becoming a condition for recognition of new sovereign states — witness the practice of the European Community and that of the United States and Canada *vis-à-vis* the attainment of sovereignty by the former republics of Yugoslavia and of the Soviet Union. Furthermore, the fact that a sovereign Quebec would be automatically subject to international instruments with respect to human rights, including the International Covenant on Civil and Political Rights and documents adopted by the Conference on Security and Cooperation in Europe, would oblige it to ensure that such rights were respected, a condition that would be satisfied if it guaranteed the rights presently held by persons belonging to the English-speaking minority.

The "Distinct Society" Concept

The affirmation that Quebec is a "distinct society" is a form of recognition of its right to self-determination and autonomy within Canada. Contrary to what some provincial premiers believe, however, such recognition is primarily symbolic. Its legal impact appears very limited — and indeed much more so since the formulation of the federal constitutional proposals of September 1991, which are reflected in the report of the Special Joint Committee on a Renewed Canada.

The impact is reduced because recognition of Quebec as a distinct society can now have no effect on the sharing of power, which reflects the degree of autonomy a people hold. If the distinct society provision is confined to an interpretation clause in the Canadian Charter of Rights and Freedoms, it can be invoked only to justify the reasonableness of limitations on individuals' rights enshrined in the Charter so that the collective rights of the distinct society of Quebec may be preserved. Furthermore, the interpretation of the Charter must be in keeping with the goal of promoting the linguistic and cultural vitality and development of English-speaking and French-

speaking minorities throughout Canada, making the reasonableness of limitations all the more difficult to prove.[51] In fact, it may make it impossible, given the lack of congruence of the objectives being sought. In the attempt to better define the distinct society concept, it has been reduced to three aspects — linguistic (Quebec has a French-speaking majority), cultural (Quebec has a unique culture), and legal (Quebec has a civil law tradition) — thereby limiting the clause's application and decreasing the degree of autonomy that it was supposed to confer.

This constitutional reduction of Quebec's autonomy would not, however, prevent the Québécois from exercising its right to self-determination. The recognition of this right is really what makes Quebec distinct and what allows its people to control their own destiny, to determine their political status, and to ensure their own economic, social, and cultural development, as provided in *An Act Regarding the Process of Determining the Political and Constitutional Future of Québec*.

Conclusion

With all due respect to historian Desmond Morton and to those opposed to the exercise of the right to self-determination, one must reiterate that there is in Quebec a very broad consensus that the people are free to control their own destiny, to determine their own political status, and to ensure their own economic, social, and cultural development. From a political standpoint, which is the focus of Morton's analysis, it is difficult to place legal constraints on the desire for freedom. A law-abiding state, as Canada is supposed to be, cannot prevent a people claiming freedom from breaking through

51 For an analysis of the very limited impact of the distinct society clause contained in the Meech Lake Agreement, see J. Woehrling, "L'Accord du lac Meech et l'application de la Charte canadienne des droits et libertés," in G. Beaudoin, ed., *Vues canadiennes et européenes des droits et libertés* (Montreal: Éditions Yvon Blais, 1989), pp. 377–418.

the screen of sovereignty of the state and calling into question its territorial integrity and political unity.

As the events of the past few months have shown, the right to self-determination has not lost its evocative power. It will continue to be invoked as peoples struggle to determine their own future and to pursue their own economic, social, and cultural development. It is the negation of this right that kindles the desire for independence and induces peoples to replace demands for autonomy with demands for secession. It is undoubtedly the negation of Quebec's right to self-determination — its demand to be recognized as a truly distinct society having been rejected by Canada — that is at the root of the present constitutional crisis and that is breeding in the Québécois people, as in other peoples, the desire to control its destiny.

Although Canada may not have learned this lesson, it should be otherwise for an independent Quebec. It would not be able to deny the native nations' demands for autonomy or the rights of its English-speaking minority, for it could expect these groups, in turn, to want to freely control their own destiny or link it to that of a people more respectful of collective and individual rights. For while ours is "un pays à comprendre," as Quebec *chansonnier* Gilles Vigneault sings, it is above all "un pays à changer."

The Contributors

A.L.C. de Mestral is Professor of Law at McGill University, where he teaches constitutional law, international trade law, and European Community law. Among his recent publications are *The Canadian Law and Practice of International Trade* (with J.-G. Castel and W.C. Graham, 1991); *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.* (with T. Gruchalla-Wesierski, 1990); *International Law* (with H. Kindred et al., 1987); *International Business Transactions* (1986); and *Introduction to International Law*, 2nd ed. (with S.A. Williams, 1986).

Stanley H. Hartt, Q.C. is Chairman, President, and Chief Executive Officer of Camdev Corporation, Toronto. His career in the federal public service included the positions of Chief of Staff, Office of the Prime Minister (1989–90) and Deputy Minister of Finance (1985–88). He was admitted to the Bar of the Province of Quebec in 1965, and practised law for many years with the firm of Stikeman, Elliott in Montreal.

Vilaysoun Loungnarath is Professor of Law at the Université de Montréal, specializing in securities regulation and international economic law. He studied at the McGill University, l'Institut européen d'administration des affairs (INSEAD) at Fontainebleau, and the University of California at Berkeley. Before joining the Université de Montréal, he practised law with the law firm of Ogilvy, Renault.

John McCallum is Chair and Professor of Economics and Dean of the Faculty of Arts at McGill University. His research interests have focused on applied macroeconomics, cross-country comparisons, and Canadian economic policy and history. He is the editor of the C.D. Howe Institute's *The Canada Round*, a series of studies on the economics of Canada's constitutional crisis.

Desmond Morton was born in Calgary in 1937. He was educated in Canada, Japan, and England, and served ten years in the Canadian Army. He has been principal of the Erindale campus of the University of Toronto since 1986, and is the author or co-author of 26 books on Canadian military, political, and industrial relations history.

Daniel Turp is Associate Professor at the Faculty of Law, Université de Montréal, and Secretary-General of the Société québécoise de droit international. He is a member of the Quebec Bar, and has degrees in law from Paris II University and the International Law Academy at The Hague.

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McKinsey & Company
Maclab Enterprises
James Maclaren Industries Inc.
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MacMillan Bloedel Limited
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Tangled Web:
Legal Aspects of Deconfederation

Stanley H. Hartt, Q.C., A.L.C. de Mestral, John McCallum, Vilaysoun Loungnarath, Desmond Morton, and Daniel Turp

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Leading off Part I, *Stanley H. Hartt* focuses on the dozens of little-known provincial laws that play a major role in fostering interprovincial trade and that would probably cease to exist if Quebec separated. *A.L.C. de Mestral* describes the degree of economic integration that is present under the GATT, the Canada-U.S. Free Trade Agreement, the Treaty of Rome, and the Canadian federal system, and warns that it is a dangerous fallacy to think the GATT and the FTA would guarantee Quebec unimpeded access to the economic space of North America. *John McCallum* echoes this view, arguing that the trade-fostering properties of the Canadian economic union are far superior to those of an FTA. *Vilaysoun Loungnarath*, however, cites the example of the Benelux countries and maintains that a high degree of economic integration can be achieved without political integration.

Part II opens with a summary of a paper by *José Woehrling*, published by the Bélanger-Campeau Commission, in which he analyzes the process of Quebec separation with or without Canada's agreement. Historian *Desmond Morton* responds by arguing that politics will prevail over law and that Canadians would be unique if they were to achieve a "friendly breakup." *Daniel Turp* closes the volume with a discussion of Quebec's right to self-determination, as well as the implications of secession for Quebec's aboriginal peoples and anglophone minority.

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